United States Court of Appeals for the Second Circuit



APPELLANT'S BRIEF & APPENDIX

76-7383

In the

UNITED STATES COURT OF APPEALS

For the Second Circuit

JACK A. KAMPMEIER, et al.,

Plaintiffs-Appellants,

-vs-

EWALD NYOUIST, et al.,

Defendants-Appellees.

ON APPEAL FROM THE DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK Civ 76-167



BRIEF HAPPENDIX

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STATEMENT OF THE CASE

Appellants seek to reverse an Order Denying Application for Preliminary Injunction issued by the United States
District Court for the Western District of New York (Burke,
J.), dated July 27, 1976 (A-58).*

The appellants are public junior high school students and their parents. The students desire to participate in physical education classes, and intramural and interscholastic athletics, including so-called contact sports. Appellees are local school commissioners and school boards and officials of the New York State Education Department.

The students, each of whom has vision primarily in one eye, have been refused the right to participate in a variety of athletic endeavors, specifically those that do or may result in bodily contact, e.g., basketball, football and softball. The sole reason advanced by appellees for this refusal is the lack of vision in one eye. The capability of the students to participate has never been questioned since each has demonstrated superior athletic ability.

The decision to deny participation was made in each case by the school physician and affirmed by the respective school boards, which were apparently acting pursuant to guidelines promulgated and adopted by the New York State Education Department. (A-43).

^{*} References are to annexed appendix.

Both the local school boards and school districts and the State Education Department were named as defendants because neither assumed authority with respect to the decision making process underlying the policies sought to be enjoined.

Plaintiffs obtained an Order to Show Cause on April 14, 1976 (A-1). Their Notice of Appeal was filed August 3, 1976.

STATEMENT OF ISSUES

Whether appellants should be entitled to an injunction permitting them to participate in school athletics to the extent of their capabilities.

Whether appellants have demonstrated that they will suffer irreparable harm because they have been and are being prevented from participating in school athletics.

The district court answered both questions in the negative.

ARGUMENT

I HANDICAPPED STUDENTS AND/OR STUDENTS TREATED AS HANDICAPPED, SHOULD BE ENTITLED TO AN IN-JUNCTION PERMITTING THEM TO PARTICIPATE TO THE EXTENT OF THEIR CAPABILITIES IN ALL SCHOOL ATHLETICS.

A. The Rehabilitation Act of 1973, 29 U.S.C. 701 et Seq., precludes schools receiving federal funds from discriminating against handicapped students.

Section 504 of the Rehabilitation Act of 1973, now 29 U.S.C. 701 et seq., which, among other things, establishes a Rehabilitation Services Administration with machinery for federal grants and assistance for services for the handicapped, provides at \$794:

No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

The Act applies to all federally assisted programs, not merely to those established under the Act. Executive Order No. 11914 (41 Fed. Reg. 17871, April 28, 1976) makes the Act applicable to any program or activity receiving federal financial assistance. In addition the Act's legislative history states that the non-discrimination provisions were intended to have the broad proscription of applying to all federally assisted programs. The Senate Report stated that the bill was

intended to proclaim "a policy of non-discrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance," S. Rep. No. 93-318, printed at 1973-2 U.S.C.C. & A.N. 2076, 2123, and that Section 504 was designed to prohibit "discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving Federal financial assistance." id. at 2143.

The legislative history further stated, at 1974-4 U.S.C.C. & A.N. 6373, 6388, that:

a test of discrimination against a handicapped individual under section 504 [now 29 U.S.C. §794] should not be couched either in terms of whether such individual's disability is a handicap to employment, or whether such individual can reasonably be expected to benefit, in terms of employment from vocational rehabilitation services. Such a test is irrelevant to the many forms of potential discrimination covered by section 504.

Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs.

29 U.S.C. 706(6) defines "handicapped individual" as follows:

The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such persons major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment. Emphasis added.

Because of the fact that this action is brought pursuant to Section 794 of Title 29, which is part of subchapter V of the Chapter, the definition pertaining to Chapter V is applicable. Hence the term "handicapped individual" is defined as emphasized above.

As stated in the legislative history at 1974-4 U.S.C.C. & A.N. 6376, 6389-6390:

The amended definition eliminates any reference to employment and takes cognizance of the fact that handicapped persons are discriminated against in a number of ways. First, they are discriminated against when they are, in fact, handicapped (this is similar to discrimination because of race and sex). Second, they are discriminated against because they are classified or labelled, correctly or incorrectly, as handicapped (this has no direct par-

allel in either race or sex discrimination, although racial and ethnic factors may contribute to misclassification as mentally retarded). Third, they are discriminated against if they are regarded as handicapped, regardless of whether they are infact handicapped (this has a parallel in race discrimination where a person is regarded as being of a minority group even though, in fact, he or she is not).

Clause (A) in the new definition eliminates any reference to employment and makes the definition applicable to the provision of Federally-assisted services and programs. Clause (B) is intended to make clearer that the coverage of sections 503 and 504 extends to persons who have recovered - in whole or in part from a handicapping condition, such as a mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped (for example, as mentally ill or mentally retarded) but who may be discriminated against or otherwise be in need of the protection of Sections 503 and 504.

Clause (C) in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their. life activities and who thus are not technically within clause

(A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap.

handicapped by the state and school districts there is no reason why they should be prohibited from participating in any activity open and available to non-handicapped persons. They have, of course, been defined by their school physicians as handicapped. Indeed, the respondent Pittsford School District has admitted in its Answer that Margaret Kampmeier was defined as "handicapped" by the school physician in October, 1975 (A-52). The State and the school districts are using a whipsaw argument which on the one hand asserts that the students are handicapped and thus should not be permitted to participate in certain kinds of activities but on the other, argues that they are not handicapped individuals. It is submitted that the defendants should take the position that either the students are not handicapped and hence should not be prohibit d from engaging in all acti-

vities open to non-handicapped students or, if the infant plaintiffs and others similarly situated are to be deemed handicapped, then their right to participate in athletics and other school activities should be determined in accordance with the federal law.

In <u>Hairston v. Drosick</u>, (U.S.D.C. SD W. Va. 1976), the Court applied 29 U.S.C. 794 to a situation involving a minimally handicapped student. <u>Hairston</u> involved a student seeking to attend a public grade school. The school officials had prohibited her admittance because she had a physical condition known as spina be ida, resulting in a minor physical impairment, including incontinence of the bowels and a noticeable limp. The Court found that she was clearly physically able to attend school in the regular public classroom and was of normal mental competence and capable of performing easily in a regular classroom situation.

The Court held as follows:

The exclusion of a minimally handicapped child from a regular public classroom situation without a bona fide educational reason is in violation of Title V of Public Law 93-112, "The Rehabilitation Act of 1973", 29 U.S.C. §794. The federal statute proscribes discrimination against handicapped individuals in any program receiving federal financial assistance. To deny a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of the benefits of such program in violation of the statute. School officials must make every

effort to include such children within the regular classroom situation, even at great expense to the school system.

Lack of or limited vision in one eye, especially if the individual takes steps to overcome that handicap, is certainly a minimal handicap.

Although regulations have not been promulgated to effectuate section 504, proposed rules have been published.

41 Fed. Reg. 29548, July 16, 1976. The introduction to the proposed rules reveals much concerning the current policy and practice of the Department of Health, Education and Welfare concerning the Act, set out, in pertinent part, as follows:

. . . the prohibition of discrimination in the statutory provisions of section 504 is absolute and contains no exceptions designed to take into account any resulting burden to recipients of Federal assistance . . ., [I]n the constitutional context, lack of resources cannot be used to justify a denial of basic rights and that, in particular, cost may not be taken into consideration with respect to the right of handicapped children to a suitable education . . . Emphasis added. 41 F.R. at 29549

Since the statute protects both those who are correctly and those who are erroneously handicapped, appellants, through the admitted action of the school districts and the state, fall within the definition.

Appellants are certainly "otherwise qualified" individuals. They have shown ability to participate in and excell at the proscribed athletic endeavors. All they desire is an opportunity to compete, to try to make the team, or squad. If their abilities are not equal to their desire, let their coaches and teachers make those determinations, upon the same basis and by the same standards which are applied to others.

B. If a handicap does not adversely affect capability, the equal protection clause requires a school to permit a student to participate.

Appellants contend that a denial by their respective school boards and school districts of the right to participate in physical education classes, intramural and interscholastic athletics, is violative of the Equil Protection Clause of the United States Constitution.

The rights of the "handicapped", including those of individuals with vision in one eye, seeking to participate in school athletic programs, have been upheld by courts under equal protection concepts.

In <u>Suemick v. Michigan High School Athletic Assn.</u>

(U.S.D.C. ED Mich, 1973), it was held that a high school student with one leg must be afforded the opportunity to play football. The decision was based on the Equal Protection Clause.

The Court stated:

. . . the plaintiff has made a strong showing of probable success at trial. It has been recognized that a student's right to participate in interscholastic sports is a substantial right, cognizable by the federal courts in a civil rights action challenging a limitation of that right

as a violation of the equal protection clause. Brenden v. Independent School District 742, 477 F.2d 1292 at 1299, an Eighth Circuit case, and Morris v. Michigan High School Athletic Association, 472 F.2d 1207, a Sixth Circuit case. Regardless of whether the constitutionality of the rule in this case is measured by the rational basis test or the more exacting compelling state interest test, it appears that the plaintiffs challenge is indeed meritorious and his chances of ultimately prevailing are strong . . . Finally, we must look to where the public interest lies. And in this regard, the observation is inescapable that plaintiff's accomplishments in overcoming the effects of a serious handicap certainly serve as an inspiration to other handicapped people, both young and old, and provide us all with a dramatic example of how enormous odds against achievement can be overcome by hard work and dedication to purpose. The public interest is served by such exemplary efforts and achievements as the plaintiff has made. It would be of no service to the public interest for this Court, pursuant to a rule of dubious legality, to force plaintiff off the playing field now and thereby stifle the example he has set.

The recent case of <u>Borden v. Rohr</u>, (U.S.D.C. DS Ohio 1976) is also directly on point. The case involved a student at Ohio University with one eye who sought to continue to play basketball. The Court granted a preliminary injunction. Relevant excerpts from its oral decision are as follows:

through the Fourteenth Amendment, at this point in time, it appears to the Court that unless the defendants are able to demonstrate a rational basis for the differentiation that they make to this plaintiff than those other persons who qualified for junior basketball at Ohio University, then the decision not to let him play must fall unless you demonstrate a rational basis for it,

. . . I have heard no evidence from the defendant which convinces me that they have evaluated or they know of how much risk is involved in him playing and subsequently losing the sight of an eye through basketball activity . . . [I]t would appear to me that unless there is more evidence coming from the defendant which would tend to establish a rational basis for a decision at trial, the chance of Mr. Borden prevailing at a trial on the merits of this case is exceedingly good . .

Now, I don't think that this plaintiff or I or any one of us here can say what the responsibility is for an enormous attraction that college sports activity has in our society, what the realities are that these attractions are. So we take that away from him, and I think it is taking away a valuable part of his life style, so therefore, if he isn't allowed to play I think even for a short period of time through the month of February, whenever basketball season is, through the month of February, I think you have irreparably harmed this young fellow . . .

... there is another public interest consideration which is emerging, and that is the regard and the status in this society of those who have some sort of a handicap ... We're encouraging them to fully participate to the best of their ability and the extent of their physical resources in their own personal affairs and the affairs of our social kind of living, so we lend encouragement to them . . .

. . . [B]ut I do think, in this instance, the public interest, in my judgment, lies with allowing this man to live his own life, risk it, risk his eye to some degree . . .

In considering equal protection arguments, courts
must initially confront and resolve the threshold issue of that
standard is properly applied to assertions of denial of equal
protection. Traditional equal protection analysis is bifurcated. Most classifications are subject to the standard of rationality which tests whether the challenged classification
bears a reasonable relation to legitimate legislative objectives.
Where a statute affects a "fundamental interest" or employs
a "suspect" classification, however, the strict scrutiny test
is applied. That test requires that the legislative purpose
be so compelling as to justify the means utilized. Decellants
contend that even if the rational basis test applies, the classification does not pass constitutional muster.

The inflexibility of the traditional equal protection approaches is manifest, each being polarized and outcome-determinative. Thus, the United States Supreme Court has recently departed from these standards and established a middle level of review in Equal Protection cases and has applied diverse standards in reviewing discrimination allegedly violative of the Equal Protection clause. Courts now scrutinize the particular classification, weighing the societal importance of the interest adversely affected and the invidiousness of the basis upon which the classification is drawn. Indeed, the New York Court of Appeals, following the Supreme Court, has recently jettisoned the traditional two-tiered approach in favor of what it has denominated a "sliding-scale approach". Malpica-Orsini Blasi, 36 N.Y.2d 568, 370 N.Y.S.2d 511 (1975).

The results of this change can be seen in recent cases in which several state and federal acts have been held to violate the Equal Protection clause although rational reasons for their enactment were proffered. Thus, in <u>Jimenez v. Weinberger</u>, 417 U.S. 628 (1974), the Court struck down a provision of the Social Security Act which provided that certain illegitimate children, who could not qualify for benefits in any other fashion, could obtain benefits under the Act only if a disabled parent contributed to the child's support or lived with the child prior to the parent's disability. The appellants contended that to deny benefits to illegitimates not dependent on a parent at the time of the parent's disability abridged their constitutional rights. The appellee, however, argued,

and the Court agreed, that since an economic interest only was being affected, the rational basis standard would be applied. The Court, however, held that although that test applied and although the appellee had indeed advanced a rational basis for the legislation, it was nevertheless constitutionally deficient. The fact that a legitimate government interest was fostered by the classification, in that it prevented the presentation of spurious claims, was not sufficient, in and of itself, to insulate the legislation from constitutional attack.

Moreover, in Reed v. Reed, 404 U.S. 71 (1971), the Court struck down an Idaho statute which provided that as between persons equally qualified to administer estates males must be preferred over females. The Court noted that the rational basis test applied in weighing the validity of the statute, and even though a reasonable basis for the classification was advanced, viz. that the arbitrary preference of males reduced the workload of probate courts by eliminating one class of contests, the legislation could not stand. Accord, Stanton v. Stanton, 421 U.S. 7 (1975).

When the defendants' conduct is measured by this stricter standard, its discriminatory nature becomes apparent. Even if the defendants advance a rational basis for the enactment of this legislation, namely that a denial of participation inures to the benefit of the plaintiffs since it obviates the possibility of injury to the functional eye, it nevertheless cannot withstand judicial scrutiny. The Supreme Court has manifested a willingness to depart from the traditional Equal Protection analysis and plaintiffs submit that the societal impor-

tance of allowing these children to participate in sports and the invidiousness of the classification compel a determination that the defendants' conduct is proscribed.

Appellants also contend that their situation is no different than that of young females seeking to play baseball. The equal protection arguments are the same.

In <u>Brenden v. Independent School District</u>, 477 F.2d 1292 (8th Cir. 1973) the Court in upholding the right of female students to participate in interscholastic athletic programs theretofore provided solely for males, stated as follows as 1297:

The High School League contends that relief under the Civil Rights Act is inappropriate because participation in interscholastic sports is a privilege and not a right. We disagree. The Supreme Court has rejected "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege' Graham v. Richardson, 403 U.S. 365, 374, 91 S. Ct. 1848, 1853, 29 L.Ed.2d 534 (1971). The question in this case is not whether the plaintiffs have an absolute right to participate in interscholastic athletics but whether plaintiffs can be denied the benefits of activities provided by the state for male students . . .

And further the Court stated:

Discrimination in high school interscholastic athletics constitutes discrimination in education. 477 F.2d at 1298.

and further:

. . . plaintiffs' interest in participating in interscholastic sports is a substantial and cognizable one. 477 F.2d at 1299.

In the case of Morris v. Michigan State Bd. of Ed., 472 F.2d 1207 (6th Cir. 1973), in which a preliminary injunction issued to enable females to participate in high school sports, the Court held:

On the basis of the pleadings and such record as has been developed thus far in this proceeding in the District Court, we believe that the District Court had jurisdiction under 28 U.S.C. \$1343 and 42 U.S.C. \$1983 (1970) to consider the claimed discrimination involved in the exclusion of girls from interscholastic competition in noncontact sports and to enter a temporary injunction in relation thereto. 472 F.2d at 1209.

Additionally, in the recent case of Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975), the Court assumed jurisdiction to require a municipal little league to permit girls to play. In the very recent case of Carnes v.

Tennessee Secondary School Athletic Association (DC Tenn. 5/7/76), the Court ordered a high school to permit a girl to play on its baseball team. The Court said:

If the plaintiff is denied the right to participate in baseball, her injuries would be greater than those incurred by the defendants if she is permitted to participate.

Defendants have submitted no authority which supports their position on this issue. Plaintiffs submit that the denial of the educational benefits of participation in athletics on the basis of a handicap raises equal protection issues which have been fully recognized by the courts.

It is submitted that the school districts' sole basis for preventing Margaret and Steven from participating in athletics is their fear of liability in the event of injury to the remaining eye. This fear should not be permitted to obfuscate the issues. There is always a risk of injury in athletics, especially in contact sports. This risk, however, is no different for appellants than it is for two-eyed individuals. While the consequences of injury may vary, the chance of injury to a particular eye of a particular individual pursuing a particular activity remains the same whether or not that individual has a second functioning eye. The risk permitted must be the same for all who otherwise have the ability to participate in the chosen activity.

If junior high students are permitted to play football, Steven Genecco, who can play, ought to be able to try out for the team. If he cannot make it because of lack of ability, so be it. If he plays, and injures a muscle, let the team physician decide whether the injury is likely to be aggravated by further play. But, in the first instance, where there has been no medical assertion that appellant's alleged handicap may be aggravated by merely playing, then they ought to be allowed to try to make the team.

II THE STUDENTS CONTINUE TO SUF-FER IRREPARABLE HARM BECAUSE THEY ARE PREVENTED FROM PAR-TICIPATING IN SCHOOL ATHLE-TICS.

Both infants, junior high school students, desire to continue to participate in a wide range of athletic programs. These programs (interscholastic, intramural and physical education classes) include so-called contact sports. Both Margaret and Steven have evidenced achievement in athletics, Margaret in basketball, soccer, softball, floor hockey and volleyball, Steven in basketball, football, wrestling, soccer and softball.

Other than reduced (in Margaret's case) or lack of vision in one eye (in Steven's case) these students possess no other physical handicap.

Each has been denied participation in chosen sports activities. Although both students have each many years of potential athletic participation remaining, each also has but a finite number of years of participation remaining.

Both students have been taught to be intellectually and physically aware of their near blindness in one eye and, simultaneously, taught to participate in all activities with confidence and competence. Both were vigorous, enthusiastic and talented participants in a wide range of athletic activi-

ties. Both had conquered difficulties and learned skills such that they were superficially indistinguishable from others.

Most importantly, their abilities and achievements taught them that they were at least as capable as others. Neither ever thought of himself or herself as handicapped. The facts said that they were normal. Both had, in fact, accomplished the goal of those who teach the handicapped, i.e., both children were in the mainstream.

In the fall of 1975, Peggy Kampmeier and Steve Genecco were hauled from this mainstream and benched. They were
converted, by definition, from participants to handicapped observers. They were instructed by the public schools in their
inadequacies, their weaknesses, their deficiencies, and their
vulnerabilities. Their competence was disputed and their confidence undermined. They now must think of themselves as handicapped.

The irreparable harm to them continues. Each new day and each new opportunity denied becomes a new confirmation of their inadequacies. Sports are, of course, an intimate part of the social, physical, and intellectual life and growth of teenage children. The school's action not only forces the children to consider themselves handicapped; it insures that all others will know of their deficiencies. These children are now all but compelled to wear Hawthorne's scarlet letter etched indelibly on their gymsuits so that all will know and none forget.

Sports activities are an integral and fundamental mechanism for social, intellectual and physical growth. When the child desires to participate a prohibition by the school must obviously restrict growth and development. The result is a clear, undeniable and continuing irreparable harm.

There has been no assertion by the defendants that the issuance of an injunction will cause any harm or danger to them or other parties. These children have been raised and taught to cope with themselves and their world in a manner which is most beneficial to society. The public interest, it is submitted, is best served by teaching perseverance, confidence and competence. The schools' actions teach the opposite and are contrary to the interests of a humane and responsible society. The public interest requires that these children be encouraged and, in fact, emulated.

Irreparable harm was found in <u>Borden</u>, <u>supra</u>. In <u>Sue-mick</u>, <u>supra</u>, the Court also held that the plaintiff had demonstrated that he would have suffered irreparable harm if an injunction was not issued, relying on medical testimony that "[i]t may be of great harm to Ron if he is not allowed to play after all the time and effort he has put into rehabilitating himself from the effects of his tragic accident."

No one can return to these students the participation thus far denied. It is requested, however, that the right to participate be immediately restored.

CONCLUSION

For the foregoing reasons, appellants submit that the decision of the Court below denying their application for a preliminary injunction was in error. The order of the district court should be reversed and the injunction granted.

Dated: September 27, 1976

Respectfully submitted,

dward H. Fox

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APPENDIX

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

JACK A. KAMPMEIER and ANNE
D. KAMPMEIER, Individually
and as Parents and Natural
Guardians of MARGARET KAMPMEIER,
an Infant; SUSAN W. GENECCO
and LEO G. GENECCO, Individually
and as Parents and Natural
Guardian of STEVEN GENECCO,
an Infant, all Individually
and on behalf of all others
similarly situated,

Plaintiffs,

-vs-

EWALD NYQUIST, in his capacity as Commissioner of Education; LEO A. SOUCY, Individually and as Assistant Commissioner for School Services, University of the State of New York; NANCY HARRIS; GEORGE R. BENT; KEVIN KEOGH; JEFFREY B. LARSON; ANN MCALISTER; JAMES M. PRICE; JOHN E. SWETT, Individually and as Members of the Board of Education of the Pittsford Central School District; RICHARD HIBSCHMAN, Individually and in his capacity as Superintendent of Schools, Pittsford Central School District; WILLIAM A'IDREWS; PATRICK BURNS; JOHN FARNSWORTH; LEO HOSENFELD; RICHARD KOLB; LORRAINE LUNDY; SANDRA McGAVERN; DR. HARRY PITLER, Individually and as Members of the Canandaigua Central School District; DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District,

Defendants.

ORDER TO SHOW CAUSE

76 -/6.7

Upon the verified complaint and plaintiffs' memorandum of law attached hereto, it is

ORDERED, that defendants show cause before this Court at the United States Courthouse, State Street, Rochester, New York at 10:00 a.m. on April 26, 1976, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein enjoining the defendants, their agents, servants, employees and all persons in active concert and participation with them, pending the final hearing and determination of this action, from interfering with the plaintiffs' right to engage in interscholastic, intramural or gym class athletics, be they contact or non-contact; and it is further

ORDERED, that service of a copy of this order to show cause together with a copy of the papers hereto attached on defendants and on the Attorney General of the State of New York by delivery of such Order to an Assistant Attorney General at an office in Albany County, on or before April 19, 1976 at 5:00 o'clock p.m. be deemed sufficient service; and it is further

ORDERED that an employee of Infoscarch, Inc., a private process service agency with offices in Albany, New York, over the age of 18 years and not a party to this action be and hereby is appointed to serve this order, complaint and memorandum upon those defendants residing in Albany County, that Bulan Philips, who is over the age of 18 years and not a party to this action be

and hereby is appointed to serve this order, complaint and memorandum upon those defendants residing in Monroe County and that Onuid X. Occicco, who is over the age of 18 years and not a party to this action be and hereby is appointed to serve this order, complaint and memorandum upon those defendants residing in Ontario County.

Issued: April /4 , 1976

S/ HPDGLD P. BURKE District Court Judge

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO.

JACK A. KAMPMEIER and ANNE D. KAMPMEIER, Individually and as Parents and Natural Guardians of MARGARET KAMPMEIER, an Infant; SUSAN W. GENECCO and LEO G. GENECCO, Individually and as Parents and Natural Guardians of STEVEN GENECCO, an Infant, all Individually and on behalf of all others Plaintiffs, similarly situated, -vs-

EWALD NYQUIST, in his capacity as Commissioner of Education; LEO A. SCUCY, Individually and as Assistant Commissioner for School Services, University of the State of New York: Makicy HARRIS; GRORGE RL BENT; KEVIN KEOGH; JEFFREY B. LARSON; ANN MCALISTER; JAMES M. PRICE; JOHN E. SWETT, Individually and as Members of the Board of Education of the Pittsford Central School District; RICHARD HIBSCHMAN, Individually and in his capacity as Superintendent of Schools, Pittsford Central School District; WILLIAM ANDREWS; PATRICK BURNS; JOHN FARNSWORTH; LEO HOSEN-FELD; RICHARD KOLB; LORRAINE LUNDY; SANDRA MCGAVERN; DR. HARRY PITLER, Individually and as Members of the Board of Education of the Canandaigua Central School District; DR. John SKAWSKI, Individually and in his capacity as Superintendent of Schools, Cahandaigua City School Distri

SUMMONS

You are hereby summoned and required to serve upon Edward H. Fox, Esq.

plaintiff's attorney , whose address is Two State Street, Rochester, New York, 14614

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

S/ John K. adams Clerk of Court.

Deputy Clerk.

Date: April 14, 1976

To the above named Defendant s:

[Scal of Court]

Note:-This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

JACK A. KAMPMEIER and ANNE
D. KAMPMEIER, Individually
and as Parents and Natural
Guardians of MARGARET KAMPMEIER,
an Infant, 36 Larchwood Drive,
Pittsford, New York, 14534;
SUSAN W. GENECCO and LEO
G. GENECCO, Individually
and as Parents and Natural
Guardians of STEVEN GENECCO,
an Infant, 148 Deerfield
Drive, Canandaigua, New York,
14424, all Individually and
on behalf of all others similarly
situated,

Plaintiffs,

CIVIL ACTION NO.

COMPLAINT .

-vs-

EWALD NYQUIST, in his capacity as Commissioner of Education: LEO A. SOUCY, Individually and as Assistant Commissioner for School Services; University of the State of New York, State Education Building, Albany, New York, 12207; NANCY HARRIS, 4040 East Avenue, Rochester, New York, 14618, GEORGE R. BENT, 16 Van Cortland Drive, Pittsford, New York, 14534, KEVIN KECGH, 37 Charter Oaks Drive, Pittsford, New York, JEFFREY B. LARSON, 16 Cricket Hill Drive, Pittsford, New York, ANN MCALISTER, 47 Whitecliff Drive, Pittsford, New York, JAMES M. PRICE, 476 Mendon Center Road, Pittsford, New York, JOHN E. SWETT, 44 Southerland Street, Pittsford, New York, Individually and as Members of the Board of Education of the Pittsford Central School District; RICHARD HIBSCHMAN, Individually and in his capacity as Superintendent of Schools, Pittsford Central School District; WILLIAM

ANDREWS, North Road, Canandaigua, New York, PATRICK BURGS, Middle Choshire Road, Canandaigua; New York, JOHN FARMSWORTH, 42 Arlington Park, Camandaigua, New York, LEO HOSENFELD, 29 South Main Street, Canandaigua, New York, RICHARD KOLB, 32 Deerfield Drive, Canandaigua, New York, LORFAINE LUNDY, 92 Deerfield Drive, Camandaigua, New York, SANDRA McGAVERY, 90 Gorham Street, Canandaigua, New York, DR. HARRY PITLER, 10 Brook Street, Cananiaigua, New York, Individually and as Members of the Board of Education of the Canandaigua Central School District; DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District, 236 East Gibson Street, Canandaigua, New York, 14424,

Deferants.

INTRODUCTION

1. This is an action for declaratory and injunctive relief arising under the United States Constitution, the Civil Rights Acts, and the Rehabilitation Act of 1973 to enforce the rights of physically handicapped persons. This suit is brought to prevent discrimination against the infant plaintiffs, junior high school students, each with vision primarily in only one eye, who have participated and are des. sof continuing to participate in gym class activities and to play intramural and interscholastic athletics, including so-called contact sports, at Pittsford Mendon Central School (Kampmeier) and Canandaigua Junior Academy (Genecco), schools receiving funds from the State of New York and the federal

government. The infant plaintiffs are able to see well enough to engage in said athletics but defendants have refused to allow them to participate.

JURISDICTION

2. The jurisdiction of this Court is based upon 42 U.S.C. 1983, 28 U.S.C. §§ 1331(a) and 1343(3), Fourteenth Amendment to the United States Constitution and 29 U.S.C. 794. The claims herein involve the denial of Federal Constitutional and statutory rights.

PARTIES

- 3. Plaintiffs Jack A. and Anne D. Kampmeier are the parents of Margaret Kampmeier. All are citizens of the United States and of the State of New York, residing in Pittsford, New York. Margaret is a 7th-grade student at Pittsford-Mendon Central School, a public secondary school located in Pittsford, New York and operating under rules and regulations of the New York State Education Department and the federal government.
- 4. Plaintiffs Susan W. and Leo G. Genecco are the parents of Steven Genecco. All are citizens of the United States and of the State of New York, residing in Canandaigua, New York. Steven is an 8th-grade student at Canandaigua Junior Academy, a public school located in Canandaigua, New York and operating under the rules and regulations of the New York State Education Department and the federal government.

- 5. Defendant Nyquist is the Commissioner of The State
 Education Department of New York and as such is the administrative
 head of the Department. He is sued in his official capacity.
- 6. Defendant Soucy is Assistant Commissioner for School Services of the New York State Education Department and as such has power and authority to promulgate and approve policies relative to medical requirements for organized interscholastic athletic activities, which policies are being challenged in this lawsuit. He is sued individually and in his official capacity.
- 7. Defendants Harris, Bent, Keogh, Larson, McAlister, Price and Swett are the members of the Board of Education of the Pittsford Central School District and as such have power and authority to promulgate, review, approve and implement policies relative to medical requirements for athletic activities at Pittsford-Mendon Central School, which policies are being challenged in this lawsuit. They are sued individually and in their official capacity.
- 8. Defendant Hibschman is Superintendent of the Pittsford-Mendon School District and as such has the power and authority to promulgate, review, approve and implement policies and
 guidelines of the State Education Department and the PittsfordMendon School District, including the policies being challenged in
 this lawsuit. He is sued individually and in his official capacity.

- 9. Defendants Andrews, Burns, Farnsworth, Hosenfeld, Kolb, Lundy, McGavern and Pitler are the members of the Board of Education of the Canandaigua City School District and as such have power and authority to promulgate, review, approve and implement policies relative to medical requirements for athletic activities at Canandaigua Junior Academy, which policies are being challenged in this lawsuit. They are sued individually and in their official capacity.
- 10. Defendant Skawski is Superintendent of the Canandaigua City School District and as such has the power and authority to promulgate, review, approve and implement policies and
 guidelines of the State Education Department and the Canandaigua
 City School District, including the policies being challenged in
 this lawsuit. He is sued individually and in his official capacity.

FIRST CLAIM (OF KAMPMEIERS)

- 11. Plaintiffs restate and reallege the allegations heretofore set forth.
- 12. Margaret Kampmeier has a condenital cataract in one eye. At the beginning of her 7th-grade year, she was one of the best athletes in her class. In October, 1975, she was defined as "handicapped" by the school physician and denied permission to participate in interscholastic contact sports, and in January, 1976, she was denied participation in gym class contact sports, and intramural contact athletics.

- 13. Plaintiffs Kampmeier provided her with protective glasses with industrial quality safety lenses and wire mesh side shields, with extended ear pieces.
- 14. Notwithstanding this protection, she was continually denied permission by the defendants to participate in interscholastic contact sports, including basketball, contact sports in gym class, and intramural contact athletics.
- 15. Pittsford Central School District and Pittsford-Mendon Central School, upon information and belief, receives state and federal funds.
- 16. The sole reason for the refusal of permission to engage in the aforesaid athletic activities was and is that Margaret Kampmeier has vision primarily in only one eye.
- 17. Plaintiffs Kampmeier have and are willing to release Pittsford Central School District, its agents and assigns, from any liability for any injury to that eye arising out of athletic activities. They have attempted to obtain insurance for Margaret, without success.
- 18. Margaret Kampmeier is qualified physically and otherwise to play contact sports. See letters of Drs. Talpey and Donovan, attached hereto and made a part hereof as Exhibits "A" and "B".
- 19. Plaintiff Margaret Kampmeier is a "handicapped" individual as defined in 29 U.S.C. Section 706(6).

20. Plaintiff Margaret Kampmeier was excluded from participation in an activity, denied the benefits of an activity, and subjected to discrimination under an activity by defendants in violation of 29 U.S.C. Section 794.

SECOND CLAIM (OF GENECOS)

- 21. Plaintiffs restate and reallege the allegations herotofore set forth.
- 22. The infant plaintiff Steven Genecco is 13 years of age and in the 8th grade in the Canandaigua Public School System. He has been virtually blind in one eye since he was injured in the first grade at age 6. Since that time, he has been allowed to participate in all school sports even though his disability was known to school officials and recorded in his school health records.
- 23. During 1975, Steven participated in interscholastic basketball and a community association football league as well as the regular school physical education program.
- 24. On or about November, 1975, defendant Skawski prohibited Steven Genecco from participating in contact sports. On or about February 12, 1976, defendants Canandaigua School Board members also prohibited Steven from engaging in contact sports.
- Junior Academy receive federal and state funds.

- 26. The sole reason for the refusal of Steven Genecco to play contact sports is and was that he has vision in only one eye.
- 27. Steven Genecco is qualified physically and otherwise to play contact sports.
- 28. Steven Genecco is a "handicapped" individual as defined in 29 U.S.C. Paragraph 706(6).
- 29. Steven Genecco was excluded from participation in an activity, denied the benefits of an activity, and subjected to discrimination under an activity by defendants in violation of 29 U.S.C. Section 794.

THIRD CLAIM OF ALL PLAINTIFFS

- 30. Plaintiffs restate and reallege the allegations stofore set forth.
- 31. The refusal of permission to participate in contact sports deprives plaintiffs of equal protection of the laws and of liberty without due process of law contrary to the Fourteenth Amendment to the United States Constitution and in violation of their civil rights in violation of 42 U.S.C. Section 1983.

FOURTH CLAIM (OF ALL PLAINTIFFS)

- 32. Plaintiffs restate and reallege the allegations heretofore set forth.
 - 33. Plaintiffs have been forced to miss substantial

participation in various interscholastic, intramural and gym class sports.

- 34. Plaintiffs will be denied participation in corract sports during the remainder of the current school year unless this Court grants immediate relief.
- 35. Margaret Kampmeier, in January, 1976 was prohibited by defendants from engaging in basketball, floor hockey and volley-ball. She would have engaged in intramural volleyball and basketball had she been so permitted.
- 36. Upon information and belief, practice for intramural softball at Pittsford-Mendon Certral School commences on or about April 30, 1976. Margaret Kampmeier desires to participate in intramural softball or gym class softball. In the fall of 1976, she wishes to participate in interscholastic, intramural or gym class field hockey or soccer.
- 37. Steven Genecco desires to be able to participate in gym class softball during the remainder of the spring semester. He desires to participate in interscholastic football and basket-ball during the 1976-77 school year. Defendants have denied to him the right to participate in the following sports: football, soccer, basketball, wrestling and softball.
- 38. The harm to be suffered by the plaintiffs will be irreparable.
 - 39. Plaintiffs thus request a preliminary injunction.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request:

- (a) that a preliminary injunction issue based on this Complaint enjoining the defendants from interfering with the plaintiffs' right to engage in interscholastic, intramural or gym class athletics be they contact or non-contact.
- (b) that the Court finally decide and declare the defendant's actions as set forth above to be unlawful and/or unconstitutional and issue a permanent injunction.
- (c) that the Court grant plaintiffs costs, disbursements and attorneys fees.
- (d) that the Court grant such other relief as it deems to be fit and proper.

Dated: April 12, 1976.

Attorney for Plaintiffs,

of counsel to the New York Civil Liberties Union, Genesee Valley Chapter

Two State Street

Rochester, New York 14614 Telephone: (716) 232-4440

PAUL J. YESAWICH, III, of Counsel Two State Street Rochester, New York Telephone: (716) 232-4440

LOREN WARBOYS, of Counsel
New York Civil Liberties Union
Genesee Valley Chapter
545 Powers Building
Rochester, New York 14614
Telephone: (716) 454-4334

BURTIS B. BREESE, M.D. FRANK A. DISNEY, M.D. WILLIAM TALPEY, M.D. JOHN L. GREEN, M.D.

ELMWOOD PEDIATRIC GROUP 1580 ELMWOOD AVENUE ROCHESTER, NEW YORK 14620

October 17, 1975

Pittsford Central School Pittsford, New York

To Whom It May Concern:

Peggy Kampmeier has a congenital cateract of her left eye. Since this has been present since her birth it really presents no great physical or emotional problem for her even though her vision in that eye is quite minimal. Neither her ophtholmologist nor I feel it should be any hinderence to her full participation in school athletic activities.

Sincerely,

William B. Talpey,

WBT:nh

EXHIBIT "A"

BERNARD F. DONOVAN, M. D. 1360 MOUNT HOPE AVENUE ROCHESTER, NEW YORK 14620 244-7390 AREA CODE 716 December 22, 1975 Dr. Donald Eldredge, M.D. 19 State Street Pittsford, NY 14534 RE: Margaret Kampmeier Dear Dr. Eldredge: The following information is submitted at the request of the parents of the above student. They would like the possibility of her participation in contact sports to be considered in the light of a discussion which I had with them in the office on December 19, 1975. As you know, the restriction under consideration in her case is based on the fact that she is moderately myopic in the right eye but has good corrected vision in that eye and has an amblyopic left eye related to a congenital cataract. I feel that with special protective eye wear the risk to either eye is rather remote. However, there is a risk, and the protective eye wear would by no means guarantee the safety of her eyes. I hope that this will be of help to you in deciding in the question of the contact sports for this student. Sincerely, Bernard F. Donovan, M.D. BFD/plc EXHIBIT "B" A-17

VERIFICATION

STATE OF NEW YORK) COUNTY OF MONROE) ss.:

We, Jack A. Kampmeier and Anne D. Kampmeier, are plaintiffs in this action and have read the foregoing Complaint and swear and affirm that the facts stated herein are true and correct to the best of our knowledge, information and belief.

Jack A. KAMPHEIER / Ampirice

Sworn to before me this

13th day of April, 1976.

s/Edward H. Fox Notary Public

We, Susan W. Genecco and Leo G. Genecco, are plaintiffs in this action and have read the foregoing Complaint and swear and affirm that the facts stated therein are true and correct to the best of our knowledge, information and belief.

SUSAN W. GENECCO GREEK

LEO G. GENEROCO

Sworn to before me this /2+h day of April, 1976.

livered H. Tox

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

JACK A. KAMPMEIER and ANNE
D. KAMPMEIER, Individually
and as Parents and Natural
Guardians of MARGARET KAMPMEIER,
an Infant; SUSAN W. GENECCO
and LEO G. GENECCO, Individually
and as Parents and Natural
Guardian of STEVEN GENECCO,
an Infant, all Individually
and on behalf of all others
similarly situated,

Plaintiffs,

-vs-

EWALD NYQUIST, in his capacity as Commissioner of Education; LEO A. SOUCY, Individually and as Assistant Commissioner for School Services, University of the State of New York; NANCY HARRIS; GEORGE R. BENT; KEVIN KEOGH; JEFFREY B. LARSON; ANN MCALISTER; JAMES M. PRICE; JOHN E. SWETT, Individually and as Members of the Board of Education of the Pittsford Central School District: RICHARD HIBSCHMAN, Individually and in his capacity as Superintendent of Schools, Pittsford Central School District; WILLIAM ANDREWS; PATRICK BURNS; JOHN FARNSWORTH; LEO HOSENFELD; RICHARD KOLB; LORRAINE LUNDY; SANDRA McGAVERN; DR. HARRY PITLER, Individually and as Members of the Canandaigua Central School District; DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District,

Defendants.

ANSWERING AFFADIVIT

CIVIL ACTION NO. 76-167

STATE OF NEW YORK)
) SS:
COUNTY OF ONTARIO)

Dr. John Skawski being duly sworn deposes and says:

That he is Superintendent of Schools of the Canandaigua Central School District and as such is responsible for the administration of said school system in accordance with regulations and directives of the State Education Law and the Commissioner of Education and the Board of Education of the Canandaigua Central School District.

Regulations of the Commissioner of Education dealing with athletic participation by students impose a duty on the school district to provide adequate health examinations before participation in strenuous activity, and periodically throughout the season. Regulations further provide that no student shall participate in such activity without approval of the school medical officer.

The medical officer employed by the school district, Dr. Charles E. Bathrick, did examine the student Steven Genecco and based on said examination and after consultation with an outside specialist, did determine that Steven Genecco, because of lack of vision in one eye, should not be permitted to participate in the contact sports of football, soccer, basketball, wrestling or softball. (See exhibits "A", "B" and "C" attached hereto.)

Your deponent and the school district is bound by state educational regulations and directives to abide by the determination of the school medical officer as to the physical disability

BERT E. MUEHE TTORNEY AT LAW EMPLE BUILDING COURT STREET NANDAIGUA. N. Y. of a student and to the extent which any student shall be permitted to engage in scholastic athletic activities.

The determination of the medical officer is subject to attack only if it is arbitrary and unreasonable and constitutes an abuse of descretion. The Commissioner of Education has decreed that the "welfare of the student involved" shall be the primary rationale for a medical officer's determination.

Your deponent submits that the decision of the school medical officer has not been arbitrary but is reasonable and is in the best interest of the student considering the nature of Steven Genecco's disability. The disability, which results from the loss of one eye, is functional in the terms of participation in athletics. Lack of depth perception can increase the risk of further injury, not only to the remaining sight, but to other parts of the body.

No contrary medical opinions have been submitted on behalf of the student Steven Genecco with the moving papers nor have any been supplied to your deponent.

WHEREFORE your deponent respectfully requests that the application of Susan W. Genecoc, Leo G. Genecoo and Steven Genecoo for a temporary Injunction be denied and the Complaint be dismissed together with the costs and disbursements of this action.

Sworn to before me this 24th day of April, 1976.

Notary Public

//.

ROPERT E MITTHE No. 35 801/150 Notice Public, Stain of Blow York Gordfood in Stain of Blow York My Commission Expense March 30, 19 22

BERT E. MUEHE STORNEY AT LAW EMPLE BUILDING GOURT STREET NANDAIGUA. N. Y.

CANANDAIGUA MEDICAL GROUP, P. C. 338 PANNISH STREET CANANDAIGUA. NEW YORK 14424 TELEPHONE 315-394-2500 M. M. MERRILL. M. D. C. E. BATHRICK, M. D. E. P. O'HANLON. M. D. J. F. BOWEN. M. D. P. O'BRIEN, M. D. R. S. FACKLER, M. D. T. BRONDUM, M. D. J. A. ORBOCK, M. D. J. E. RANDALL. M. D. P. M. STANDISH. M. D. J. M. GUATTERY. M. D. December 20, 1975 Dr. John Skawski Superintendent of Schools 236 East Gibosn Street Canandaigua, New York 14424

> Re: Steven Genecco Dear Dr. Skawski:

Enclosed find a copy of the consultation performed by Dr. Caccamise on Steven Genecco. The letter is self explanatory and substantiates my position of restricting Steven's participation

in any contact sport.

Also enclosed is the statement for profes-sional services by Dr. Caccamise.

Sincerely;

C. E. Bathrick, M. D.

(School Physician)

CEB:dl

EXHIBIT A

WILLIAM C. CACCAMISE. M. D.

233 ALEXANDER STREET
RECHESTER. NEW YORK 14607

Telephone 325-6160

December 16, 1975

C. E. Bathrick, M.D.
Canandaigua Medical Group, P.C.
335 Parrish Street
Canandaigua, New York 14424

Re: Steven Genecco

Dear Dr. Bathrick:

Steven Genecco of 148 Deerfield Drive in Canandaigua, New York was examined by me at your request on 12/9/75. Inasmuch as you are thoroughly familiar with this 13 year old boys eye history, I shall not reiterate it at this time. As you pointed out to me in our telephone conversation, the patient's mother is extremely concerned about his being able to participate in so-called contact sports such as football and basketball. My examination of Steven revealed essential the same findings that Dr. Hicks described in his detailed letter.

was examined by me at your request on 12/9/75. Inasmuch as you are thoroughly familiar with this 13 year old boys eye history, I shall not reiterate it at this time. As you pointed out to me in our telephone conversation, the patient's mother is extremely concerned about his being able to participate in so-called contact sports such as football and basketball. My examination of Steven revealed essentially the same findings that Dr. Hicks described in his detailed letter to you. The visual acuity without correction was 20/20 in the right The uncorrected visual acuity in the left eye was counting fingers at 2 feet. There was no lens that would improve the visual acuity in the aphakic left eye. Cycloplegic refraction revealed a slight degree of hyperopia in the right eye - +.75. Slit lamp examination revealed the perforating corneal scar that the patient has as a result of his earlier childhood accident. There is a rather dense membrane covering the pupillary region. There are some Elschnig pearls in the ater cataract. Thorough fundus examination of the right eye with the indirect ophthalmoscope revealed no pathology. The fundus was easily evaluated out to the ora serrata. The fundus of the left eye could not be seen adequately because of the density of the after cataract. Applanation tonometry was normal.

It is my opinion that Steven is essentially a one-eyed individual. The right eye appears to be perfectly normal at this time. There is no binocular single vision and therefore, no true depth perception because of the marked deficiency in the aphakic left eye. If anything should happen to the right eye which resulted in loss of the vision in that eye, heroic measures could be carried out on the left eye in an attempt to resurrect some of the vision in that eye. However, the prognosis for recovery of vision significant for normal every day activities would be extremely guarded. Apparently a macular lesion has been seen during earlier examinations by Dr. Hermann and suspicioned by Dr. Hicks.

WILLIAM C. CACCAMISE, M. D.

233 ALEXANDER STREET
ROCHESTER, NEW YORK 14607

TELEPHONE 325-6160

December 16, 1975

To: C. E. Bathrick, M.D.
Re: Steven Genecco
page 2

It is my opinion that the disadvantages
contact sports far outweigh any possible adva
eyed boy. I, therefore, feel that his athlet
be limited to so-called non-contact sports su

It is my opinion that the disadvantages of participating in contact sports far outweigh any possible advantages in this one-eyed boy. I, therefore, feel that his athletic activities should be limited to so-called non-contact sports such as tennis, track, non-diving swimming, cross country skiing, and cautious Alpine skiing. An attempt was made to emphasize my thoughts on this matter to the mother.

If you have any questions concerning the ocular status of Steven, please feel free to contact me.

Sincerely yours

William C. Caccamise, M.D.

WCC/mds dictated:12/10/75

EXHIBIT B-1

CANANDAIGUA MEDICAL GROUP. P. C. 335 PARRISH STREET CANANDAIGUA. NEW YORK 14424 TELEPHONE 315-394-2500 M. M. MERRILL. M. D. C. E. BATHRICK. M. D. E. P. O'HANLON. M. D. J. F. BOWEN, M. D. P. O'BRIEN, M. D. T. BRONDUM, M. D. J. A. ORBOCK, M. D. J. C. CARPENTER. M. D. J. E. RANDALL. M. D. R. S. PACKLER. M. D. P. M. STANDISH. M. D. J. M. GUATTERY. M. D. FEB 13 973 February 11, 1976 Chia si the L., . . . et Concharges City School Duriet Dr. Joel Radin, Principal Canandaigua Junior Academy 235 North Main Street Canandaigua, New York 14424 Re: Steve Genecco Dear Dr. Radin; In answer to your letter dated January 6, 1976 regarding the activities that Steve Genecco may participate. Be advised that he may not participate in football, soccer, basketball, wrestling or softball. He may participate in archery, volleyball, swimming, gynmastics, track and field. At the time of participation in all athletic endeavors supervising personal should be fully aware that Mr. Genecco is a one eyed individual and all reasonable precautions taken to prevent injury to the remaining good eye. Sincerely; E. Bathrick, M. D. School Physician CEB:dl EXHIBIT C A-25

OR THE WESTERN DISTRICT OF NEW YORK

CACK A. KAMPMEIER and ANKE D. MAMPMEIER, Individually and as Parents in Natural Guardians of MARCASET KAMPLER, in The set Such W. Chrecco and LDG G. GENECCO, Individually and as Parents and Natural Guardian of Steven Genecco, an Infant, all Individually and on behalf of all others similarly situated,

Plaintiffs

ACCIO: ..O. 76-CIV-157

-VS-

TWALD NYQUIST, in his capacity as Commissioner of Iducation; LEO A. SOUCY, Individually, and as Assistant Commissioner for School Services, University of the State of New York; NANCY HARRIS; GEORGE R. BENT; KEVIN KEOGH; JEFFREY B. LARSON; ANN MCALISTER; JAMES M. PRICE; JOHN E. SWETT, Individually and as Members of the Board of Education of the Pittsford Central School District; RICHARD HIBSCHMAN, Individually and in his capacity as Superintendent of Schools, Pittsford Central School District; WILLIAM ANDREWS; PATRICK BURNS; JOHN FARNSWORTH; LEO HOSENFELD; RICHARD KOLB; LORRAINE LUNDY; SANDRA McGAVERN; DR. HARRY PITLER, Individually and as Members of the Canandaigua Central School District; DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District,

Defendants.

STATE OF NEW YORK:

SS.:

COUNTY OF ALBANY :

Lawrence W. Reich, being duly sworn, deposes and sayl:

1. That he is an attorney and counselor at law duly literated to practice in all of the Courts of the State of New York, and

that he is admitted to the Bar in the United States District Court for the Western District of New York.

- 2. That he is associated with Robert D. Stone, Counsel and Deputy Commissioner for Legal Affairs for the New York State Education Department, attorney of record for the defendants EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York, and LEO A. SOUCY, individually and as Assistant Commissioner for School Services.
- 3. That this affidavit is submitted in opposition to plaintiffs' motion for preliminary injunctive relief.
- 4. That a board of education has a responsibility to take all necessary steps to safeguard the health and safety of the pupils attending its schools.
- 5. That pursuant to this responsibility, Section 902 of the Education Law requires boards of education to employ a competent physician as a medical inspector for the district for the primary purpose of giving medical examinations to pupils.
- 6. That a common duty of a school medical inspector is to provide physical examinations for pupils interested in competing in athletics.
- 7. That the Commissioner has recognized and codified this relationship by promulgating Section 135.4 (c)(7)(i)(h) of the Regulations of the Commissioner of Education (8 NYCRR) which requires a board of education "to provide adequate health examina-

tions before participation in strenuous activity and periodically throughout the season, and to permit no pupil to participate in such activity without the approval of the school medical officer".

- 8. That this regulation merely takes cognizance of the fact that it would not be to the benefit of either the pupil or the school district and therefore not educationally sound, to allow pupils to participate in athletics without a medical examination.
- 9. That a school medical inspector is retained by a board of education to render professional judgments and that as a licensed physicial he must be given broad discretion in making his judgments.
- 10. That to assist school medical inspectors called upon to make determinations concerning the eligibility of pupils to participate in sports programs, materials have been published and disseminated to school officials by the Commissioner of Education. Attached as Exhibit A is a pamphlet entitled "Medical Evaluation of the Athletes . . . a Guide" published by the American Medical Association. Attached as Exhibit B is a pamphlet entitled "Department Policy Relative to Medical Examinations for Organized Interscholastic Athletic Activities" published by the State Education Department.
 - 11. That while these materials are intended to only be guide-

lines, they represent a consistent view of the medical factors to be considered by a school medical inspector in rendering his professional judgment as to the advisability of allowing a pupil to participate in sports.

- 12. That the school medical inspectors determined the their judgment it would not be in the best medical interests of MIGARET KAMPMETER and STEVEN GENECOO to participate in contact sports and these determinations were consistent with the guidelines presented in the above mentioned materials.
- 13. Upon information and belief, that such judgments were reasonable in light of clearly-defined medical criteria and cannot be said to lack a rational basis.
- 14. That attached hereto and incorporated herein as Exhibit "C" is a copy of recent decision of the Commission of Education in Matter of Suitaleri, 11 Ed. Dept. Rep. 84, which holds that the Commissioner would not substitute his judgment for that of a school medical officer where the physician declined to allow a student with one functioning eye to participate in athletic competition.
- 15. That annexed hereto and incorporated herein as Exhibit
 "D" is a copy of a decision rendered by Mr. Justice A. Franklin
 Mahoney in Supreme Court, Albany County, which sought ravie: of

the Commissioner's determination in <u>Matter of Spitaleri</u> and which declined to interfere with the discretion vested in the school medical officer.

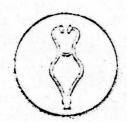
16. Upon information and belief, that this Court should iscline to issue a preliminary injunction where a clear preponderance
of medical opinion supports the position taken by the chief
medical officers of the defendant school districts that a student
with only one functioning eye should not be permitted to participate in interscholastic and intramural contact sports.

Lawrence W. Reich

Sworn to before me this 28th day of April , 1976.

Notary Public

TO FRANCE WENDERS IN SUBJECTION OF SUBJECTIO



FULLIBIT HOW

foreword

In preparing the athlete for sports participation, medical evaluation goes beyond the health examination to assure each athlete the best possible health guidance. Emphasis is to be placed on individual needs and capabilities, with the ultimate goal of furthering the health and development of youth.

The Committee on the Medical Aspects of Sports AMERICAN MEDICAL ASSOCIATION



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Printed in U.S.A.

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medical evaluation of the athlete ...a guide

Rights of the Athlete

Participation in athletics is a privilege involving both responsibilities and rights. The athlete has the responsibility to play fair, to give his best, to keep in training, and to conduct himself with credit to his sport and his school. In turn, he has the right to optimal protection against injury. This protection can be assured through:

Proper Conditioning—By strengthening the body and increasing resistance to fatigue, proper conditioning of the athlete is a significant factor in lowering the incidence and decreasing the severity of injuries.

Good Coaching—The importance of careful technical instruction in protecting the health and safety of athletes cannot be minimized. Good coaching not only leads to skillful performance, but discourages tactics—outside either the rules or the spirit of the rules—that may increase the hazard and thus the incidence of injuries.

Capable Officiating—Rules and regulations governing athletic competition are made to protect players as well as to promote enjoyment of the game. To serve these ends effectively, the rules of the game must be thoroughly understood by players as well as coaches and be properly interpreted and enforced by impartial and technically qualified officials.

Proper Equipment and Facilities—There can be no question about the protection afforded by proper equipment and facilities. Good equipment is now available and is being improved continually; the problem lies in the false economy of using inexpensive, outmoded, worn out or ill-fitting gear, and in the improper use of equipment. Provision of proper play areas and their careful maintenance are equally important.

Adequate Health Supervision—This includes: (1) a thorough preseason history and medical examination. Many of the sports tragedies that occur each year result from unrecognized health problems. Medical contraindications to participation in contact sports must be respected. (2) a physician's presence or ready availability during practice sessions and contests. Leaving to a trainer or coach decisions such as whether an athlete should return to play or be removed from a game following injury is unfair. In serious injuries the availability of a physician can make the difference in preventing disability or even death. (3) medical control of the health aspects of athletics. In medical matters, the physician's authority should be absolute and unquestioned. Coaches and athletic trainers assist the physician.

Safeguarding the Health of the Athlete

Periodic evaluation of each factor involved in protecting the athlete against injury will help to assure a safe and healthful sports experience. The following are examples of questions to be answered in such an appraisal:

Proper Conditioning

Are prospective players given directions and activities for preseason conditioning?

- . Is there a minimum of three weeks of practice before the first game or contest?
- · Are precautions taken to prevent heat exhaustion and heat stroke?
- Is each player required to warm up thoroughly prior to participation?
- Are substitutions made without hesitation when players evidence disability?

Good Coaching

- Is emphasis given to safety in teaching techniques and elements of play, such as
 a progressive method of developing difficult skills?
- Are injuries analyzed to determine causes and to suggest preventive programs?
- Are tactics discouraged that may increase the hazards and thus the incidence of injuries?
- Are practice periods carefully planned and of reasonable duration?

Capable Officiating

- · Are players as well as coaches thoroughly schooled in the rules of the game?
- Are rules and regulations strictly enforced in practice periods as well as in games?
- Are officials qualified both emotionally and technically for their responsibilities?
- Do players and coaches respect the decisions of officials?

Proper Equipment and Facilities

- Is the best protective equipment provided for contact sports?
- Is careful attention given to proper fitting and adjustment of equipment?
- Is equipment properly maintained, and are worn and outmoded items discarded?
- Are proper areas for play provided and carefully maintained?

Adequate Health Supervision

- Is there a thorough preseason health history and medical examination?
- Is a physician present for contests and practice sessions or can he be readily contacted?
- Does the physician make the decision as to whether an athlete should return to play following injury during games?
- Is authority from a physician obtained before an athlete can return to practice after being out of play because of a disabling injury?
- Is the care given athletes by coach or trainer limited to first aid and medically prescribed services?

Health Appraisal of the Athlete

First among all considerations concerning the welfare of the athlete is the preparticipation medical evaluation. With respect to the health requirements of specific sports and the interest of the medical profession in promoting healthful sports experiences, the purposes of the examination are to:

- Determine the health status of candidates prior to their participation and competition;
- Provide appropriate medical advice to promote optimum health and fitness;
- Counsel the atypical candidate as to the sports or medification of sports that for him/her would provide suitable activity;
- Restrict from participation those candidates whose physical limitations would expose them to undue risk.

The athlete's health examination can be administered in a number of ways. In some communities, each athlete is examined by his/her own family physician. Where

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available, a school of team physician sometimes does the examining. In other communities, the local medical society or health department has established an accepted procedure. Regardless of the arrangement by which the health examination is administered, the following considerations prevail:

- In fairness to the aspiring candidate, the health examination should be scheduled
 far enough in advance of practice or the conditioning program to allow, if indicated, appropriate consultation, diagnosis and treatment. The examination
 requires ample space in a quiet room with reasonable privacy and with no
 demands for undue haste.
- Evaluation should concern not only the sport in question, but all sports normally available to the youth in that community. Not all sports are of the "collision" or even body contact variety. Approval for selected athletics may be possible even when conditions are present that obviously disqualify the candidate for participation in rigorous sports. One annual health examination would then suffice, except when the candidate (a) has experienced a significant injury or illness since the last evaluation, or (b) has been encouraged after successful surgery and/or therapy to seek re-evaluation.
- The physician should avoid giving any guarantee that it will be safe for the candidate to participate. In addition, he should not undertake medical treatment without the parent's prior consent, expressed or implied, except for first aid or emergency care that is reasonably necessary to save life or prevent more serious injury. Beyond these considerations, if the physician conforms to the standards of good medical practice in his community, his legal liability in the medical supervision of an athletic team is no greater than in any other area of medical practice.

Health History—Knowledge of past illnesses, injuries, operations and immunizations is necessary for proper medical evaluation. If possible, the candidate's personal physician should carry out the health examination because he already is familiar with the candidate's past health history. Otherwise, a health history form should be completed by the candidate and his parents and made available to the physician at the time of the examination. The Suggested Sports Candidates' Questionnaire on page 5 provides an example of the information that should be included in such a form.

Laboratory Examinations—Urinalysis, hemoglobin test, tuberculin test, chest x-ray and serum lipid assessment also are recommended components of the medical appraisal. Other tests will be indicated in some cases. A recent chest x-ray is indicated on the basis of its screening accountage in detecting possible heart problems as well as pulmonary disease. And an assessment of serum lipids to detect hyperlipidemia is recommended because increasing evidence shows that even among the young, risk factors for coronary heart disease can be identified.

Immunications - All athletes should be protected adequately by immunication as locally recommended, especially against tetanus and polio.

Health Examination Form - The Saggested Health Examination Form on page 6 includes the medically observable considerations important in evaluating the advisability of a candidate's participation in achievies. Individual physicians, communities and sports organizations have used this form in its entirety or as a guideline for developing their own forms where the variety of locally existing circumstances, policies and programs make this advisable.

Freduction - Some conditions observed in routine examinations are not clearly defined or may have questionable significance. In such cases, further study (postanly by an appropriate specialist) is indicated before permission to participate is granted or withheld. Examples of conditions that in mild degree or quiescent form are not definitely disqualifying but merit further attention are: heart murmur, elevated blood pressure, impaired vision or hearing, controlled diabetes, asymptomatic orthopedic disorders, emotional disorders and anti-social behavior, and albuminuria.

Disqualifying Conditions—Some of the disqualifying conditions listed on pages 7&8 are subject to evaluation by the responsible physician with respect to anticipated risks, the otherwise athletic fitness of the candidate, special protective preventive measures that might be utilized, and the nature of the supervisory control. Disqualification does not necessarily imply restriction from all sports at that time or from the sport in question in the future. If the decision is disqualification, however, the physician vested by the school with the authority to disqualify should not be overruled by any other person. This is a direct and unavoidable responsibility, and needs the full support of the institution and all personnel involved.

Return to Play

The Suggested Return to Play Form on page 9 apprises the parents and coach of the nature and severity of an athlete's injury and permits the physician to guide him/her in gradual return to full participation.

The health appraisal is only the first link in the chain of medical athletic supervision. The most desirable plan for obtaining coordinated continuous medical attention is the one that best fits the local community, its existing policies, procedures and available personnel. The Committee recommends that local school officials and medical society representatives jointly work out arrangements that are mutually acceptable and offer optimum medical guidance for each athlete.

SUGCESTED SPORTS CANDIDATES' QUESTIONNAIRE

(To be completed by parents or family physician)

	ne address			
Par	ents' Name	Tel. No		
1.	Has had injuries requiring medical attention		Yes	1.0
2.	Has had illness lasting more than a week		Yes	7.0
3.	Is under a physician's care now		Yes	No
4	Takes medication now		Yes	No
Ś.	Wears glasses		Yes	No
	contact lenses		Yes	140
6.	Has had a surgical operation		Yes	No
7.	Has been in hospital (except for tonsillectomy)		Yes	N
8	Do you know of any reason why this individual should not participate in all sports?		Yes	No
Pin	esa explain any "Yes" answers to above questions:	Barrio (grant 1948)		
Pie —	ase explain any "Yes" answers to above questions:			
-	Has had complete poliomyelitis immunization by oral vaccine (Sapin)		Yes	
9.	Has had complete poliomyelitis immunization by oral vaccine (Sapin) Most recent tetanus toxold immunization		Yes	
- 9.	Has had complete pollomyelitrs immunization by oral vaccine (Sapin)		Yes	
- 9.	Has had complete poliomyelitis immunization by oral vaccine (Sapin) Most recent tetanus toxold immunization		Yes Yes	N N
9.	Has had complete poliomyelitis immunization by oral vaccine (Sapin) Most recent tetanus toxold immunization (date)			

SUGGESTED HEALTH EXAMINATION FORM

matee on Medic	al Aspects of S	ports of the Ar		chool Associations and the ociation.) Health examination incorned.	
Penerous	Name of 50	Laent		City and Surviv	
Grade	Age	Height	Weight	Blood Pressure	

Eyos	R 20/: L	20/ ; Ears		_Hearing R/15;L/15
Respiratory				•
Cardiovascular		•		
Liver	Splaen		Hernia	
Musculoskeletal				
Neurological			Gonitalia .	
Laboratory: Uninallysis			Otner:	
Comments		· ·		
Completed Immunizations:	Polio		Tetanus_	
		Date		. Date
instructions for use of card	Other			

"I certify that I have on this date examined this student and that, on the basis of the examination requested by the school authorities and the student's medical history as furnished to me. I have found no reason which would make it medically inadvisable-for this student to compete in supervised athletic activities, EXCEPT THOSE CROSSED OUT BELOW."

BASEDALL	FOOTBALL	ROWING	SOFTBALL	TRACK
BASKETDALL	HOCKEY .	SKATING	SPEEDBALL	VOLLEYBALL
CROSS COUNTRY	GOLF	SKIING	SWIMMING	*WRESTLING
FIELD HOCKEY	GYMMASTICS	SOCCER	TENNIS	OTHERS
*Estimated desirable v	veight level:	pounds.		
Date of Examination:	s	igned:	Examining Pi	w.c.a.
Physician's Address_				one
	UDENT PARTICIPA			
Name of student:		Nario India Mar	ne of School:	
				•

on my part and is made with the understanding that I have not violated any of the eligibility rules and regulations of the State Association. Signature of Student's

Instructions for use of card

PARENT'S OR GUARDIAN'S PERMISSION

This application to compete in interscholastic athletics for the above high school is entirely voluntary

"I hereby give my consent for the above named student (1) to represent his school in athletic activities except those crossed out on this form by the examining physician, provided that such athletic activities are approved by the State Association; (2) to accompany any school team of which he is a member on any of its local or out-of-town trips. I authorize the school to obtain, through a physician of its own choice, any emergency medical care that may become reasonably necessary for the student in the course of such athletic activities or such travel. I also agree not to hold the school or anyone acting in its behalf responsible for any injury occurring to the above named student in the course of such athletic activities or such travel."

Signature of Parent or Guardian: Address:

NOTE: This form is to be fified out completely and filed in the office of the high school principal or superintendent of schools before student is allowed to practice and/or compete.

GENERA

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LIVER

Enlarge:

SKIN

Boils, in giadiato

DISQUALIFYING CONDITIONS FOR SPORTS PARTICIPATION

Conditions	Contact	Noncontact Endurance ²	Cinar ^a
GENERAL			
Acute infections: Respiratory, genitourinary, infectious mononucleosis, hepatitis, active rheumatic fever, active tuberculosis			
			*
Obvious physical immaturity in comparsion with other competitors			
Obvious growth retardation			
Hemorrhagic disease: Hemophica, purpura, and other bleeding tendencies			
Diabetes, inadequately controlled		×	x ·
Jaundice, whatever cause			×
EYES		•	
Absence or loss of function of one eye	*		
Severe myopia	***		
EARS			
Significant impairment .			
RESPIRATORY			
Tuberculosis (active or under treatment)	*		
Severe pulmonary insufficiency			*
CARDIOVASCULAR			
Mitral stenosis, aortic stenosis, aortic insufficiency, coarctation of aorta, cyanotic neurt disease, recent carditis of any etiology			
Hypertension on organic basis		. *	×
Prévious heart surgery for congenital or acquired heart disease		*	
LIVER			
Enlarged liver			
SXIN			
Boils, impetigo, and herpes simplex gladiatorum			

Lacrosse, baseball, soccer, basketball, football, wrestling, hockey, rugby, etc.
 Cross country, track, tennis, crew, swimming, etc.
 Bowling, golf, archery, field events, etc.

Conditions	Contact	Noncontact Endurance ²	Others
SPLEEN			
Enlarged spiden			
HERNIA			
Inguinal or temoral bernia			
MUSCULOSKELETAL			
Symptomatic appormalities or inflammations	*	×	×
Functional inadequacy of the musculoskeletal system, congenital or acquired, incompatible with the contact or skill demands of the sport.		*	
NEUROLOGICAL		4	
History or symptoms of previous serious head trauma, or repeated concussions, Controlled convulsive disorder. Convulsive disorder not completely controlled by medication			
Previous surgery-on head or spine	*		
RENAL			
Absence of one kidney	x		
Renal disease	*		x .
GENITALIA **			
Absence of one testicle			
		* * * * * * * * * * * * * * * * * * * *	

1. Identific frame Grade
2. Injury (1) Time
Spon Coac
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Undescended testicle

^{*}Each putient should be judged on an individual basis. All things being equal, it is probably better to encourage a young boy or girl to participate in a non-contact sport rother than a contact sport. However, if a participate patient has a great desire to play a contact sport, and this is deemed a major ameliorating factor in his her an astment to school, associates and the seizure disorder, serious consideration should be given to letting him her participate if the seizures are controlled.

^{••}The Comminée approves the concept of contact sports participation for youths with only one testicle or with an undescended testicle(s), except in specific cases such as an inguiral canal undescended testicle(s), following appropriate medical evaluation to rule out unusual injury risk. However, the athlete, parents and school authorities should be fully informed that participation in contact sports for such youths with only one testicle does carry a shight injury risk to the remaining healthy testicle. Following such an injury, fertility may be adversely affected. But the chances of an injury to a descended testicle are rare, and the injury risk can be further substantially minimized with an athletic supporter and protective cevice.

SUGGESTED RETURN TO PLAY FORM.

Committee on the Medical Aspects of a ports of the American Mesical Association and the National Federation of State High School Associations

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	Third and Date of Injury	Game
		Otrer
		Position Played
	Couch	Office Phone Number
. :	Description of Injury	
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	*	
. F	leferred	
	lecommendations	
	No restrictions (discharged)	
•	No practice or play until	(care)
		(Definite us*, after further evaluation)
		Cattle.
		tact
•	 Regular Practice but no con Return for further care - No 	1401
•	Yes	
	Giner	
	C-1-1	
	Drug and	nPhone Number

THE UNIVERSITY OF THE STATE OF HEW YORK The State Education Repartment Albany, New York 12224

o A. Soucy Assistant Commissioner for School Services Division of Pupil Personnel Services James W. Moore, Acting Director Bureau of Health Service Onslow A. Gordon, M.D. State Medical Inspector of Schools 518: 474-6850

DEPARTMENT POLICY RELATIVE TO MEDICAL EXAMINATIONS FOR ORGANIZED INTERSCHOLASTIC ATHLETIC ACTIVITIES

Medical examinations for students before participation in interscholastic athletic competition are provided for two purposes. First, the school has a concern for the health and well-being of the student. It must have a knowledge of his physical status in order to make a medical decision as to whether or not participation in athletics might aggravate any present disability. Secondly, the medical examination provides some measure of legal protection to a school district. If a district permitted a student with a physical disability to participate in a particular athletic contest and, as a result of such participation the disability is aggravated, the district may very well be considered negligent in the event of litigation.

To implement these basic concepts, Commissioner's Regulation - 135.4, subsection (c)l (vii) - was adopted. This regulation reads as follows: --"to provide adequate health examinations before participation in strenuous activity and periodically throughout the season, and to permit no pupil to participate in such activity without the approval of the school medical officer." To carry out the provisions of this regulation, the following policies have been adopted.

1. The school physician has the absolute authority to determine the physical capability of a student to participate in a port.

This does not mean that the school physician may not consult with the family and/or the attending physician in the case of illness or injury, but it does mean that the school physician is the final medical authority who decides if the student is physically able to participate at the beginning of the season or on his return to participation after absence because of illness or injury.

The terms "school physician", "school medical officer", and "school medical inspector" are synonymous.

In school districts where more than one physician is employed, the physician or physicians designated by the board of education, chief school administrator or chief medical officer, to conduct medical examinations for sports is considered the school physician for the purpose of this policy.

EXH18/15/13"

2. The school physician's examinations may be started on August 1 and shall indicate the category or categories of activities in which the student my participate.

There is no implication that the examinations must be completed during the month of August. If a student wishes to participate only in a spring season sport, he can have his examination any time between August 1 and the beginning of the opert season in which he plans to participate. If a student wishes to participate in football, basketball and baseball (fall, winter and spring season sports), he must have an examination some time between August 1 and the opening of the football season. It will not be necessary to examine him again before the basketball and baseball season unless there has been an intervening illness or injury.

3. The examination and approval of the school physician shall be valid for the school year with the exception as noted in item 4.

When applicable, the athletic examination meets the requirements of Section 903 of the State Education Law.

4. If the student is absent from school for 5 or more consecutive school days or has received an injury, he must have an examination by the school physician refere returning to competition.

RELEVANCY TO PARTICIPATION are the key words relative to this policy. A boy who plays football and baseball may be absent 5 or more cays from school in January because of influenza, but this has no relevancy to his participation in football and baseball. If the same illness had occurred in the middle of the football season, then it would have relevance to his participation in football. If the same boy suffered a knee or ankle injury on the ski slopes in January, there is relevance as far as his participation in baseball is concerned. A boy who has a "black eye" has suffered an injury but this has no relevance to his participation in a sport. A fractured finger may or may not have relevance to a boy's participation. Common sense and medical judgment must be exercised.

5. The American Medical Association's pamphlet entitled "A Guide for Medical Evaluation for Candidates for School Sports" may be the criteria used by the school physician in his decision to qualify or disqualify.

In the event a physical disability is found, either mentic ed in the guidelines or not mentioned, then the best judgment of the school physician must be exercised.

Dr. Isao Hirata, team physician at Yale University, in his book "The Doctor and the Athlete", very ably expressed a cardinal principle in the medical supervision of athletics. He said, "---if there is a risk of permanent disability of any kind, either now or in the future, under any or all practice and game conditions, that athlete should and must be kept from the playing field, regardless of objections from him or anyone else." We are in entire agreement with this philosophy.

6. To promote uniformity and common understanding, the following costificate should be used by all school districts. After actation by the physical education tember, the certificate should be fille in the public current we realth record in the school nurse-teacher's cirice.

Sample Cortificate Name	of School	
This certifies that Tolion to participate in the following cate year 1971-72.	is physical societies of competition duri	ically qualified ng the scho ol
group of activities.	intes discuplification for	the particular
Contact or Collision Sports	Endurance Activities	Others
	卤	· 🗹
Contact or Collision Sports	Engurance Activities	Others
Football Baseball Basketball Succer Hockey (both field and ice) Wrestling Rugby Lacrosse Softball Reason for disqualification	Oymnastics Switting Track Cross Country Tennis Skiing Volley Ball Crew Handball Fencing	Bowling Colf Archery Field Events Rifle Team Cheerleading
Date: <u>March 22, 1971</u>	Signed - Tal Da	/ /

because of illness or because of a significant injury. A new certificate must be issued before he is allowed to participate.

This certificate is void if the pupil is absent from school for 5 or more days

In the example cited above, John Jones cannot participate in any of the sports listed under contact or collision sports because of blindness in one eye. However, he can participate in the activities listed under "endurance and other" sports. If, for example, the student has tuberculosis, then none of the three boxes will be checked and he cannot participate in any of the activities listed in the various categories.

With some few additions as suggested by the staff of the Department's Division of Physical Education, the categories of sports as listed in the sample Certificate are those suggested by the American Medical Association. Some school districts may wish to reproduce the Guidelines for Disqualification on the reverse side of the certificate for ready reference by the school physician. These

desdelines represented below are only guidelines and are not absolute mandates for the school physicism. Under subsection Cardiovascular, the final example is interpreted to recom, "Significant residual heart disease icilowing heart surgery for congenital or acquired heart disease."

DISQUALIFYING CONDITIONS FOR SPORTS PARTICIPATION

Conditions	Contact ¹	Noncontact Endurance ¹	Gitter ³
GENERAL ,			
Acute infections Reparatory, peritorically, infections monoscicles in, hepatics, active theomatic fever, active tuberculous, both, furnicules, impetigo	•		
Obvious physical immutating in comparsion with			
other competitions Obstous prowth retardation		•	
Hemorrhapie disease: Emorrhapie disease: Emorrhapie disease: tendencies			
Diabetes, inadequately controlled	x	*	
Jaundice, whatever cause	x		
EYFS	num s * v i ji ji ji	4.4	
Absence or loss of function of one eye			
Nevere myopia, even if correctable	x		
EARS			
Significant impairment	¥ .		
RESPIRATORY	·		
Tuberculous Lictive or under treatment)		1	
Score politionary insufficiency			
CARDIOVASCULAR			
Mural steams, authorsteams, aortic insufficiency, coaretation of corta, evanotic heart disease, recent cardins of any englogy	*x		*
Hypertension on organic basis	x	x .	
Previous heart surgery for congenital or acquired heart disease		10 mg	
LIVER			
Folarged liver	*		
SPLIEN			
I marged spices			
HERNIX	•		
Incomal or femoral beroid	•	x .	
Incumal of templar actua			
MUSCULOSKFLETAL			
Symptomatic abnormalities or inflammations	X	x .	
Functional madequacy of the inneclosseletal system, concentral or accurred incompatible with the contact or skill demands of the sport	*	, x	Approved by:
NEU WOLOGICAL			1.161
History or symptoms of previous serious head -			Leo A. Soucy
Consulsive disorder not completely controlled by medication			Assistant Cormissioner For School Services
Previous surgery on head or spine			Tot School Services
RENAL			
Absence of one kidney	*		
Kenal disease	¥	*	* *
Ğınıtadır			
Absence of one testicle			
Undescend testicle			

A-46

UNITED STATES DISTRICT COUPT WESTERN DISTRICT OF NEW YORK

JACK A. KAMPMEIER and ANNE D. KAMPMEIER, Individually and as Parents and Natural Guardians of MARGARET KAMPMEIER, an Infant; SUSAN W. GENECCO and LEO G. GENECCO, Individually and as Parents and Natural Guardians of STEVEN GENECCO, an Infant, all Individually and on behalf of all others similarly situated,

Plaintiffs,

-vs-

EWALD NYQUIST, in his capacity as Commissioner of Education; LEO A. SOUCY, Individually, and as Assistant Commissioner for School Services, University of the State of New York; NANCY HARRIS; GEORGE R. BENT; KEVIN KEOCH; JEFFREY B. LARSON; ANN MCALISTER; JAMES M. PRICE; JOHN E. SWETT, Individually and as Members of the Board of Education of the Pittsford Central School District; RICHARD HIBSCHMAN, Individually and in his capacity as Superintendent of Schools, Pittsford Central School District; WILLIAM ANDREWS; PATRICK BURNS; JOHN FARNSWORTH: LEO HOSENFELD: RICHARD KOLB; LORRAINE LUNDY; SANDRA MCCAVERN; DR. HARRY PITLER, Individually and as Members of the Canandaigua Central School District; DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District,

Defendants.

ANSWERING AFFIDAVITS
CIVIL ACTION NO.

76-167

STATE OF NEW YORK)
COUNTY OF MONPOF) SS:

RICHARD HIBSCHMAN, being first duly sworn, deposes and says:

That he is Superintendent of School, Fittsford Central School District, and as such is responsible for the administration of that school district in accordance with regulations and directives of the New York State Education Law and the Commissioner of Education.

Regulations of the Commissioner of Education dealing with physical education and participation by students found at 8 N.Y.C.R.R. \$135.4(c)(7)(i)(h) impose a duty on the school district "to provide adequate health examinations before participation in strenuous activity and periodically throughout the season as necessary, and to permit no pupil to participate in such activity without the approval of the school medical officer".

The medical officer employed by the school district, Dr. Donal: M. Eldredge, did examine the said Margaret Kampmeier and found that she should be disqualified from participation in contact sports. His opinion in letter form is attached at Annex "A".

Your deponent, as Superintendent of Schools, is bound by the above referenced regulations to abide by the determination of the school medical officer as to the disability and extent of participation of a student in athletic activity. There is no indication here that the determination of Dr. Laredge

was in any way arbitrary or unreasonable, nor that it constitutes an abuse of discretion. Furthermore, in accordance with holdings of the New York State Commissioner of Education, it appears that the medical determination was in the best interest and welfare of the student involved. The effective lack of vision in one eye can increase the risk of injury to various other parts of the student'sbody, and injury to the remaining good eye would be catastrophic, resulting in functional blindness.

This affidavit is submitted in opposition to the extant motion for a preliminary injunction without waiving, in any way, the jurisdictional defenses of deponent. Your deponent has not been served personally, but merely received a single copy of the motion papers which was left at the offices of the School District. On information and belief, no effective service on deponent has been achieved.

WHEREFORE, your deponent respectfully requests that the application on behalf of plaintiffs Kampmeier for a preliminary injunction be denied and the complaint herein be dismissed together with the costs and disbursements of this action.

Sworn to before me this.

30 day of April, 1976

Notary Public in the State of New York

MONROE COUNTY, N. Y.

Commission Expires March 30, 14.7.

PITTSFORD CENTRAL SCHOOL

AREA CODE: 716 381-9910

PITTSFORD, NEW YORK 14534

DR. RICHARD D. HIBSCHMAN
Superintendent of Schools

April 28, 1976

As a School physician for the Pittsford Central School District, I have examined Margaret Kampmeier and have recommended to the School Board that she be disqualified from participating in contact sports, either gym or extraclass. My decision is based on her medical condition of blindness in one eye due to a congenital cataract and corrected myopia in the other eye. Hence, she has vision in only one eye. Should an injury occur to her functional eye, this could result in total loss of vision and hence impairment of other talents the child might have or develop. I strongly feel that participation in contact sports is an unreasonable risk for this student.

The Guidelines for Disqualification for Sports Participation (AMA recommendations), approved by the State Education Department, effective August 1, 1971, are enclosed. Under the heading of "EYES" in that document, it is stated, "..the absence or loss of function of one eye" should result in disqualification in contact sports.

I also strongly subscribe to the statement made by Dr. Isao Hirata, Director of Student Health Services at the University of South Carolina, in his book, "THE DOCTOR AND THE ATHLETE", in which he said, "...if there is a risk of permanent disability of any kind, either now or in the future, under any or all practice and game conditions, that athlete should and must be kept from the playing field, regardless of objections from him or anyone else."

Donald M. Eldredge, M. D.

Sworn to before me this 29th, day of April, 1976

JUTTER M WILKENS

Notary Politic in the State of New York

MOX. DE COUNTY, N. Y.

Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

JACK A. KAMPMEIER and ANNE D. KAMPMEIER, Individually and as Parents and Natural Guardians of MARGARET KAMPMEIER, an Infant; SUSAN W. GENECCO and LEO G. GENECCO, Individually and as Parents and Natural Guardians of STEVEN GENECCO, an Infant, all Individually and on behalf of all others similarly situated,

Plaintiffs,

-vs-

EWALD NYOUIST, in his capacity as Commissioner of Education; LEO A. SOUCY, Individually and as Assitant Commissioner for School Services, University of the State of New York; NANCY HARRIS; GEORGE R. BENT; KEVIN KEOGH; JEFFREY B. LAPSON; ANN MCALISTER; JAMES M. PRICE; JOHN E. SWETT, Individually and as Members of the Board of Education of the Pittsford Central School District; RICHARD HIBSCHMAN, Individually and in his capacity as Superintendent of Schools, Pittsford Central School District; WILLIAM ANDREWS; PATRICK EURNS; JOHN FARNSWORTH; LEO HOSENFELD; RICHARD KOLB; LORRAINE LUNDY; SANDRA MCGAVERN; DR. HARRY PITLER, Individually and as Members of the Canandaigua Central School District; DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District

Defendants.

ANSWER

CIVIL ACTION NO.

76-167

Defendants, NANCY HARRIS and GEORGE R. BENT, Individually and as Members of the Board of Education of the Pittsford Central School District, and defendant, RICHARD WIBSCHMAN, in his capacity as Superintendent of Schools, Pittsford Central School District, by their attorneys, LINES, WILKENS, OSBORN & BECK, as and for their answer to the plaintiffs' complaint herein, respectfully allege as follows:

FIRST: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs of the plaintiffs' complaint numbered 1, 2, 4, 5, 6, 9, 10, 13, 17, 19, 22-29, 37, and 39.

SECOND: Admits the allegations contained in the paragraphs of the plaintiffs' complaint numbered 14, 15, 33 and 34.

THIRD: Deny the allegations contained in the paragraphs of the plaintiffs' complaint numbered 16, 18, 20, 31, and 38.

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint except admit the allegations of the last sentence thereof.

FIFTH: Admit the allegations of paragraphs 7 and 8 of the complaint except deny that the listed defendants have power and authority to promulgate or approve policies relative to medical requirements for athletic activities, including the policies being challenged in this law suit.

SIXTH: Admit the allegations contained in paragraph 12 of the complaint except deny knowledge or information sufficient

to form a belief as to the truth of the first two (2) sentences thereof.

SEVENTH: Admit the allegations contained in paragraph

35 of the complaint except deny knowledge or information sufficient

to form a belief as to the truth of the second sentence thereof.

EIGHTH: Admit the allegations contained in paragraph

36 of the complaint except deny knowledge or information sufficient
to form a belief as to the truth of the last two (2) sentences
thereof.

WHEREFORE, defendants, HARRIS and BENT, and HIBSCHMAN, in his capacity as Superintendent of Schools, Pittsford Central School District, demand judgment dismissing the plaintiffs' complaint as to all claims for action against them together with the costs and disbursements of this action.

Dated: Pochester, New York May 4, 1976

> LINES, WILKENS, OSBORN & BECK Attorneys for Defendants Harris, Bent and Hibschman in his capacity as Superintendent.

Office & P. O. Address

47 S. Fitzhugh Street Rochester, New York 14614

Telephone: (716) 454-6480

TO: EDWAPD H. FOX, ESQ.
Attorney for Plaintiffs
Office & P. O. Address
2 State Street
Rochester, New York 14614

ROBERT E. MUEHE, ESQ.
Attorney for Defendant Skawski
Office & P. O. Address
Temple Bldg.
5 Court Street
Canandaigua, New York 14424

LAWRENCE W. REICH, ESQ.
ROBERT D. STONE, ESQ.
Attorneys for Defendants
Nyquist and Soucy
Office & P. O. Address
N.Y.S. Education Department
Education Building
Albany, New York 12224

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

JACK A. KAMPMEIER and ANNE
D. KAMPMEIER, Individually and
as Parents and Natural Guardians
of MARGARET KAMPMEIER, an
Infant; SUSAN W. GENECCO and
LEO G. GENECCO, Individually
and as Parents and Natural
Guardians of STEVEN GENECCO,
an Infant, all Individually
and on behalf of all others
similarly situated,

Plaintiffs,

-vs-

EWALD NYQUIST, in his capacity as Commissioner of Education; LEO A. SOUCY, Individually and as Assitant Commissioner for School Services, University of the State of New York; NANCY HARRIS; GEORGE R. BENT; KEVIN KEOGH; JEFFREY B. LARSON; ANN MCALISTER; JAMES M. PRICE; JOHN E. SWETT, Individually and as Members of the Board of Education of the Pittsford Central School District; RICHARD HIBSCHMAN, Individually and in his capacity as Superintendent of Schools, Pittsford Central School District; WILLIAM ANDREWS; PATRICK BURNS; JOHN FARNSWORTH; LEO HOSENFELD; RICHARD KOLB; LORRAINE LUNDY; SANDRA MCGAVERN; DR. HARRY PITLER, Individually and as Members of the Canandaiqua Central School District; DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District

Defendants.

ANSWER

CIVIL ACTION NO.

76-167

The defendants, William Andrews; Patrick Burns; John Farnsworth; Leo Hosenfeld; Richard Kolb; Lorraine Lundy; Sandra McGavern;
Dr. Harry Pitler, Individually and as Members of the Canandaigua
Central School District; Dr. John Skawski, Individually and in his
capacity as Superintendent of Schools, Canandaigua City School
District, answering the complaint of the plaintiffs herein,
respectfully:

FIRST: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "1", "2", "3", "5", "6", "7", "8", "12-20", "23", "26", "28", "35" and "36" of plaintiffs' complaint.

SECOND: Admit the allegations contained in paragraphs numbered "4", "24", "25", "33", "34" and "37" of said complaint.

THIRD: Deny the allegations contained in paragraphs numbered "27", "29", "31", "38" and "39" of said complaint.

FOURTH: Admit the allegations contained in paragraphs numbered "9" and "10" of said complaint, except deny that the defendants listed in those paragraphs have the power and authority to promulgate or approve policies relative to medical requirements for athletic activities, including the policies being challenged in this law suit.

FIFTH: Admit the allegations contained in paragraph numbered "22" of said complaint except that deny the allegations contained in the last sentence of said paragraph.

SIXTH: Deny each and every other allegation contained in said complaint.

DBERT E. MUEHE STORNEY AT LAW TEMPLE BUILDING B COURT STREET MANDAIGUA. N. Y. 14424 WHEREFORE, defendants; Andrews, Burns, Farnsworth, Hosenfeld, Kolt, Lundy, McGavern and Pitler; and Skawski, in his capacity as Superintendent of Schools, Canandaigua City School District; demand judgment dismissing the plaintiffs' complaint as to all claims for action against them together with the costs and disbursements of this action.

Dated: Canandaigua, New York May 5, 1976

ROBERT E. MUEHE
Attorney for Defendants;
Andrews, Burns, Farnsworth,
Hosenfeld, Kolb, Lundy,
McGavern, Pitler and Skawski
Office and P.O. Address
5 Court Street
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TO: EDWARD H. FOX, ESQ.
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LAWRENCE W. REICH, ESQ.
ROBERT D. STONE, ESQ.
Attorneys for Defendants
Nyquest and Soucy
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Education Building
Albany, New York 12224

LINES, WILKENS, OSBORN & BECK Attorneys for Defendants Harris, Bent and Hibschman Office and P.O. Address 47 South Fitzhugh Street Rochester, New York 14614

ERT E. MUEHE FORNEY AT LAW MPLE BUILDING SOUNT STREET ANDAIGUA. N. Y. UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

JACK A. KAMPHETER and ANNE D. KAMPHETER, Individually and as Parents and Natural Guardians of MARGARET KAMPHETER, an infant; SUSAN W. GENECCO and LEO G. GENECCO, Individually and as Parents and Natural Guardians of STEVEN GENECCO, an Infant; all individually and on behalf of all others similarly situated,

Plaintiffs

- VS -

CIVIL 76-167

EWALD NYQUIST, in his capacity as Commissioner of Education; LEO A. SOUCY, Individually and as Assistant Commissioner for School Services; University of the State of New York; HARCY HARRIS, GEORGE R. BEST, KEVIN KEOGH, JEFFRY B. LAPSON, ANN MC ALISTER, JAMES M. PRICE, JOHN E. SWEIT, Individually and as Members of the Board of Education of the Pittsford Central School District, RICHARD HIRSCHAM, Individually and in his capacity as Superintendent of Schools, Pittsford Contral School District, WILLIAM ANDREWS, JOHN FARNSWORTH, LEO HOSENPELO, RICHARD KOLB, LORRAINE LUNDY, SANDRA MC CAVERN, DR. HARRY PITLER, Individually and as Members of the Board of Education of the Canandaigua Central School District, DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District,

Defendants

Harris, Beach & Wilcox-2 State Street Rochester, N.Y. 14614 Attorneys for plaintiffs (Edward J. Fox, of counsel)

Robert H. Stone State Education Building Albany, N.Y. 12234 Attorneys for defendants Nyquist and Soucy Harter, Secrest & Emery
700 Midtown Tower
Pochester, N.Y. 14604
Attorneys for defendants William Andrews, John
Farnsworth, Leo Hosenfeld, Richard Kolb,
Lorraine Lundy, Sandra McGavern, Dr. Harry Pitler,
Individually and as Members of the Board of
Education of the Canandaigua Central School
District, Dr. John Skawski, Individually and in
his capacity as Superintendent of Schools,
Canandaigua City School District

Lines, Wilkens, Osborn & Beck 47 South Fitzhugh Street Rochester, N.Y. 14614 Attorneys for defendants Nancy Harris, George R. Bent and Richard Hibschman

The defendants Nancy Harris, George R. Bent and Richard Hibschman filed in opposition to the plaintiffs' motion for preliminary injunction, the affidavit of Richard Hibschman sworn to April 30, 1976 in which is incorporated defendants' request that plaintiffs' application for a preliminary injunction be denied and that the complaint be dismissed.

That request for relief is denied in so far as it requests that the complaint be disaissed.

By order of this court dated April 14, 1976 the defendants were directed to show cause before this court on April 26, 1976 why a preliminary injunction should not issue. A hearing on plaintiffs' motion for preliminary injunction was had on April 26, 1976. The motion was submitted for decision on May 3, 1976.

There is no showing that the plaintiffs will suffer irreparable harm if a preliminary injunction is denied, nor that the plaintiffs are likely to succeed in this action. Plaintiffs' application for a preliminary injunction is in all respects denied.

ALL OF THE ABOVE IS SO ORDERED.

Carrie A. Bunke

HAROLD P. BURKE United States District Judge

July 22, 1976.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

JACK A. KAMPMEIER and ANNE D. KAMPMEIER, Individually and as Parents and Natural Guardians of MARGARET KAMPMEIER, an Infant; SUSAN W. GENECCO and LEO G. GENECCO, Individually and as Parents and Natural Guardian of STEVEN GENECCO, an Infant, all Individually and on behalf of all others similarly situated,

ANSWER

CIVIL ACTION NO.

76-CIV-167

Plaintiffs,

-vs-

Education; LEO A. SOUCY, Individually, and as Assistant Commissioner for School Services, University of the State of New York; NANCY HARRIS; GEORGE R. BENT; KEVIN KEOGH; JEFFREY B. LARSON; ANN MCALISTER; JAMES M. PRICE: JOHN E. SWETT, Individually and as Members of the Board of Education of the Pittsford Central School District; RICHARD HIBSCHMAN, Individually and in Pittsford Central School District; WILLIAM

Defendants.

EWALD NYQUIST, in his capacity as Commissioner of his capacity as Superintendent of Schools, ANDREWS; PATRICK BURNS; JOHN FARNSWORTH; LEO HOSENFELD: RICHARD KOLB; LORRAINE LUNDY; SANDRA McGAVERN; DR. HARRY PITLER, Individually and as Members of the Canandaigua Central School District; DR. JOHN SKAWSKI, Individually and in his capacity as Superintendent of Schools, Canandaigua City School District,

Defendants EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and LEO A. SOUCY, individually and as Coordinator for District Organization, Health and Pupil Services, by Robert D. Stone, their attorney, for their answer to the complaint of plaintiffs herein, respectfully allege as follows:

FIRST: Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraphs numbered 1-4, 7-14, 16-19, 21-24, 26-28. The analysis of the complaint.

second: Admit the allegations of paragraphs numbered 3 and 6 of the complaint, except allege that LEO A. SOUCY is Coordinator for District Organization, Health and Pupil Pervices and deny that portion of paragraph number 6 which alleges that defendant Soucy has the power or authority to promulgate or approve policies relative to medical recoverents for organized interscholastic athletic activities.

THIRD: Admit the allegations contained in paragraphs numbered 15 and 25 of the complaint.

FOURTH: Deny each and every allegation contained in paragraphs numbered 20, 19 and 31 of the complaint.

AS AND FOR A FIRST SEPARATE AND DISTINCT DEFENSE HEREIN, DEFENDANTS ALLEGE:

FIFTH: Upon information and belief, that the instant proceeding may not properly be maintained or certified as a class action, since the conditions precedent specified in Rule 23(a) of the Federal Rules of Civil Procedure have not been satisfied.

SIXTH: Upon information and belief, that a class consisting of all students who by virtue of handicapping conditions cannot participate in interscholastic athletics in the contact or collision sports is overly broad and cumbersome.

SEVENTH: Upon information and belief, that individual questions of fact would predominate over questions of law or fact common to the purported class.

AS AND FOR A SECOND SEPARATE AND DISTINCT DEFENSE HEREIN, DEFENDANTS ALLEGE:

EIGHTH: Upon information and belief, that this Court lacks jurisdiction over the subject matter of the action.

NINTH: Upon information and belief, that no cause of action has been stated under Title 42 U.S.C., section 1983, nor does this Court have jurisdiction under Title 28 U.S.C., section 1343, subds. (3) and (4) to hear and determine an action based upon restrictions on athletic eligibility.

TENTH: Upon information and belief, that Title 29 U.S.C., sections 701 and 794 provides for a vocational rehabilitation program having as its primary objective provision of rehabilitation services designed to assist handicapped individuals to prepare for and secure gainful employment.

petitioners are not handicapped within the purview of Title 29
U.S.C., section 706, subd. (6) since such individuals do not
have a handicap which "constitutes or results in a substantial
handicap to employment and (b) can reasonably be expected to
benefit in terms of employability from vocational rehabilitation
services . . ."

TWELFTH: Upon information and belief, that since the infant

plaintiffs' are not handicapped within the purview of Title 29 U.S.C., section 706, subd. 6, no action will lie pursuant to Title 29 U.S.C., section 794.

AS AND FOR A THIRD SEPARATE AND DISTINCT DEFENSE HEREIN, DEFEN-DANTS ALLEGE:

THIRTEENTH: Upon information and belief, that plaintiffs have not been deprived of any rights, privileges or immunities secured by the Constitution of the United States.

FOURTEENTH: Upon information and belief, a classification based on the type of handicapping condition which an individual possesses is not an "inherently suspect" classification, nor does such a classification, within the context of athletic eligibility regulations, encroached upon fundamental constitutionally-protected rights.

FIFTEENTH: Upon information and belief, that since no "inherently suspect" classification is involved, nor is a fundamental right encroached upon, the proper standard of equal protection review is whether such classification bears a "rational relationship" to some permissible purpose.

SIXTEENTH: Upon information and belief, that a policy recommendation prohibiting children with vision in one eye from participating in contact or collision sports is directly related to the permissible purpose of safeguarding the health, safety and welfare of participants in interscholastic athletics.

SEVENTEENTH: Upon information and belief, that a policy recommendation prohibiting children with vision in one eye from participating in contact or collision sports can hardly be said

to lack a rational basis.

AS AND FOR A FOURTH SEPARATE AND DISTINCT DEFENSE HUREIN, DEFEN-DANTS ALLEGE:

education has a responsibility to take all necessary steps to safeguard the health and safety of the pupils attending its schools.

NINETEENTH: Upon information and belief, that pursuant to this responsibility, section 902 of the Education Law requires boards of education to employ a competent physician as a medical inspector for the district for the primary purpose of giving medical examinations to pupils.

THENTIETH: Upon information and belief, that a common duty of a school medical inspector is to provide physical examinations for pupils interested in competing in athletics.

TWENTY-FIRST: "Upon information and belief, that the Commissioner has recognized and codified this relationship by promulgating section 135.4 (c)(7)(i)(h) of the Regulations of the Commissioner of Education (8 NYCRR) which requires a board of education "to provide adequate health examinations before participation in strenuous activity and periodically throughout the season, and to permit no pupil to participate in such activity without the approval of the school medical officer".

TWENTY-SECOND: Upon information and belief, that this regulation merely takes cognizance of the fact that it would not be to the benefit of either the pupil or the school district and therefore not educationally sound, to allow pupils to participate in athletics without a medical examination.

TWENTY-THIRD: Upon information and belief, that a school medical inspector is retained by a board of education to render professional judgments and that as a licensed physician he must be given broad discretion in making his judgments.

TWENTY-FOURTH: Upon information and belief, that to assist school medical inspectors called upon to make determinations concerning the eligibility of pupils to participate in sports programs, materials have been published and disseminated to school officials by the Commissioner of Education. Attached as Exhibit A is a pamphlet entitled "Medical Evaluation of the Athletes . . . a Guide" published by the American Medical Association. Attached as Exhibit B is a pamphlet entitled "Department Policy Relative to Medical Examinations for Organized Interscholastic Athletic Activities" published by the State Education Department.

TWENTY-FIFTH: Upon information and belief, that while these materials are intended to only be guidelines, they represent a consistent view of the medical factors to be considered by a school medical inspector in rendering his professional judgment as to the advisability of allowing a pupil to participate in sports.

TWENTY-SINTH: Upon information and belief, that the school medical inspectors determined that in their judgment it would not be in the best medical interests of MARGARET KAMPMEIER and STEVEN GENECCO to participate in contact sports and these determinations were consistent with the guidelines presented in the above mentioned materials.

TWENTY-SEVENTH: Upon information and belief, that such judgments were reasonable in light of clearly-defined medical criteria and cannot be said to lack a rational basis.

TWENTY-EIGHTH: Upon information and belief, that the decisions of the chief medical officers of the defendant school districts were not made under compulsion or direction of the State Education Department or defendants NYQUIST or SOUCY but on the basis of medical criteria ap, lied on an individual basis by school district officers.

TWENTY-NINTH: Upon information and belief, that the complaint does not state a cause of action against defendants NYQUIST and SOUCY and should be dismissed.

WHEREFORE, defendants EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and LEO A. SOUCY, individually and as Coordinator for District Organization, Health and Pupil Services, demand judgment dismissing the complaint of plaintiffur hearing, together with the costs and disbursements of this action.

Dated: July 29, 1976 Albany, New York

> Yours, etc. ROBERT D. STONE

> > Lawrence W. Reich

(Of Counsel)

Attorney for Defendant STATE EDUCATION DEPARTMENT OF THE UNIVERSITY OF THE STATE OF NEW YORK

Office and P. O. Address State Education Building Albany, New York 12224 (518) 474-8864

HARRIS, BEACH AND WILCOM LILE WIN CHASE YOUNG, JR.

TWO STATE STREET

ROCHESTER, NEW YORK 14614

716-232-4440

September 27, 1976

LEON T SAWTRO

JOSEPH A TURN:

EDWARD D. BLOOM

RENNETH W. ABBOTT

J. WILLIAM ERNSTROM

PERAN S PINELLI

DAVID C. BOYSEN

FRANK S HAGELBERG

EDWARD H. FOX

LUTHER C. NAOLER

CLYDE W. REA. JR

WINTHERS CHARLES S. WILCOX
DANIEL M. BEACH. JR. (18C3-1869)
NICHOLAS E. BROWN
EDWARD HARRIS
MARSDEN TUTHILL
ABRAM R. HARPENDING
FREDERICK W. POST
EDWARD R. MACOMBER
THOMAS M. NICHOLS
ELLIOTT HORTON
ROBERT J. MOONEY
THOMAS M. HAMPSON
FELIX G. LIEBMANN
PETER ODDLEIFSON
CHARLES E. LITTLEFIELD
HREAG DONOVAN
HENRY W. WILLIAMS. JR.
JAMES M. MARTMAN
BARRY BROWN
CARL R. KRAUSE
J. REVIN MAHONEY
THOMAS P. MOONAN
STEWART D. DAVIS
WILLIAM L. DORR
A. TERRY VAN HOUTEN EDWARD H. FOX LUTHER C. NABLER CLYDE W REA.JR WINTHROF D. JOHNSON ERIC STONEHILL THOMAS D. BARTON BETH ELA WILKENS WINNIE F. TAYLOR MICHAEL C. NORMOYLE JAMES A. SPITZ.JR. PAUL J. YESAWICH. W. JAMES W. GRESENS JAMES W. GRESENS PAUL D. MEUNIER DAVID M. JACOBSTEIN STEWART D DAVIS
WILLIAM L DORR
A TERRY VAN HOUTEN
RICHARD N. CHAPMAN
SUSAN S ROBFOGEL
JOHN W. CLARKE
PAUL R. BRAUNSDORF
GUNTHER K. BUERMAN Hon. A. Daniel Fusaro Clerk, U.S. Court of Appeals for the Second Circuit U.S. Courthouse Foley Square New York, New York 10007 Kampmeie, et al. v Nyquist, et al. Docket #76-7383 Dear Sir: Enclosed herein please find 25 copies of appellants' brief with regard to the above matter, 10 of which have appendices included. Thank you for your consideration. Very truly yours, Edward H. Fox EHF: kpv Encs. Stephen V. Lines, Esq. cc: Bruce E. Hansen, Esq. Lawrence W. Reich, Esq. P.S. Each of the attorneys received one copy of the brief and one copy of the brief with appendix.